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82-1628

No.

IN THE

Supreme Court of the United States

October Term, 1982

In re BRANIFF AIRWAYS, INCORPORATED, *et al.*,
Debtors.

AMERICAN AIRLINES, INC.,
Petitioner,

vs.

BRANIFF AIRWAYS, INCORPORATED, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Questions Presented.

1. Do the United States District Courts, after entry of the judgment in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858 (1982), have jurisdiction over all cases and proceedings commenced under Title 11 of the United States Code?

2. May a United States District Court, by local rule or by specific order, validly refer an entire bankruptcy case to a bankruptcy judge and delegate thereto authority to enter final orders and judgments?

3. May non-Article III judges constitutionally enter final orders and judgments in proceedings which involve the adjudication of rights created under state law and of congressionally-created rights not public in nature?

List of Parties.

Petitioner is American Airlines, Inc., a Delaware corporation with its principal place of business in Texas. American Airlines, Inc. is a wholly-owned subsidiary of AMR Corporation, a Delaware corporation. The following are affiliates of American Airlines: AA Development Corporation; AA Energy Corporation, American Airlines Training Corporation, and Flagship International, Inc.

In addition to the Petitioner, Braniff Airways, Incorporated, and the Civil Aeronautics Board were parties to the proceeding below. It should be noted, however, that Pacific Southwest Airlines, Inc., filed a brief in the Court of Appeals in which it identified itself as an appellee even though Petitioner believes it was not a party to the proceeding in the District Court and Bankruptcy Court with respect to the issues presented by this Petition. Petitioner also is serving certain other participants in the Braniff Chapter 11 case, although Petitioner believes such participants were not parties to the proceedings below with respect to the issues presented by this Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OPINIONS BELOW.

The Decision of the Court of Appeals dated February 28, 1983, not yet reported, appears in Appendix A. The Order of the United States District Court for the Northern District of Texas dated January 14, 1983, not yet reported, appears in Appendix B, and the Memorandum Opinion dated January 20, 1983, reported at *In re Braniff Airways, Inc.*, 10 Bankr. Ct. Dec. 30 (N.D. Texas 1982), appears in Appendix C. The Order of the District Court dated January 21, 1983, not reported, appears in Appendix D, and the Order of the Bankruptcy Court dated January 15, 1983, not reported, appears in Appendix E.

STATEMENT OF JURISDICTION.

The Order of the Court of Appeals was entered on February 28, 1983. This petition was timely filed within ninety days of that date. Section 1254(1) of Title 28 of the United States Code confers on this Court jurisdiction to review the decree in question.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

U.S. Const., art. III, § 1

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598:

§ 238
§ 241(a)
§ 401(a)
§ 404(a)
§ 405

11 U.S.C. § 105

28 U.S.C. § 332(d)

28 U.S.C. § 1331

28 U.S.C. § 1332

28 U.S.C. § 1334

28 U.S.C. § 2071

Sup. Ct. R. 17

Fed. R. Civ. P. 53

Fed. R. Civ. P. 83

Fed. R. Bankr. P. 927

Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings

The text of the above-listed provisions is reproduced in Appendix F.

STATEMENT OF THE CASE.

A. Basis for Federal Jurisdiction.

The alleged basis for federal jurisdiction in the court of first instance are Sections 241(a) and 405(b) of the Bankruptcy Reform Act of 1978, Pub.L.No. 95-598 (the

"Bankruptcy Reform Act"), or, in the alternative, Sections 1331, 1332 and 1334 of Title 28 of the United States Code (the "Judicial Code"). Petitioner contends that neither asserted basis confers jurisdiction over the bankruptcy matters and proceedings below.

B. Statement of Facts.

The failure of Congress to enact remedial legislation prior to the December 25, 1982 entry of this Court's judgment in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858 (1982) has created significant confusion about the propriety of the exercise of bankruptcy jurisdiction by district court judges and bankruptcy judges. Nevertheless, transactions involving enormous sums of money and actions substantially affecting the rights of numerous parties are continuing to be considered by a court whose statutory grant of jurisdiction was found unconstitutional by this Court in *Marathon*. *Marathon* held that the jurisdictional grant to bankruptcy courts under Section 241(a) of the Bankruptcy Reform Act violated Article III of the Constitution. This Court initially stayed its ruling in *Martahon* until October 4, 1982, to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S.Ct. at 2880. Although this Court later extended the stay until December 24, 1982, it denied a December 23, 1982 request to further extend the stay. On December 25, 1982, the *Marathon* judgment was entered.

The Judicial Conference of the United States, in response to the absence of curative legislation and the expiration of the stay of judgment in *Marathon*, proposed a local rule to be adopted by all United States District Courts (the "District Courts") to govern the conduct of bankruptcy cases pending the adoption of curative legislation. At the instruction of the Fifth Circuit Judicial Council, the proposed rule was adopted in the Northern District of Texas as the Local Rule of the

Northern District of Texas Concerning Bankruptcy Cases and Proceedings (the "Local Rule"). A substantially similar local rule has been adopted in virtually every District Court.

The Local Rule automatically refers all bankruptcy cases, and all proceedings arising out of or related thereto, to the existing bankruptcy judges. In proceedings denominated "core" matters, the bankruptcy judge is authorized to enter a final judgment or order that is effective upon entry, unless stayed pending appeal. In the case of "related proceedings", the bankruptcy judge may not enter a judgment or dispositive order, but must submit findings, conclusions and a proposed judgment or order to the District Court Judge.

A party aggrieved by an order of the bankruptcy judge in a core matter must timely appeal to the District Court. The standard of review of judgments entered in core matters and of proposed judgments lodged in related proceedings is within the discretion of the District Court. The District Court Judge is not required to give deference to the findings of the bankruptcy judge and may accept, reject or modify the judgment of the bankruptcy judge.

The decision below deals directly with the issues raised by entry of the *Marathon* judgment — the Court of Appeals held that the District Courts have bankruptcy jurisdiction and may validly delegate jurisdiction to the bankruptcy judges to enter final orders and judgments. This decision affects several adversary actions brought by Braniff against third parties, as well as the interests of thousands of shareholders, creditors and other parties in interest. Because the issues presented in this case concern whether the District Courts have bankruptcy jurisdiction and whether the Local Rule, which has been adopted in substantially the same form throughout the nation, constitutionally and validly delegates such jurisdiction, this case will determine the integrity of the entire bankruptcy system.

C. Course of Proceeding and Disposition in Court Below.

On May 13, 1982, Braniff and two of its affiliated companies filed petitions for reorganization under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the "Bankruptcy Court").[1] On September 27, 1982, Braniff commenced an adversary proceeding (the "Adversary Proceeding") against the Civil Aeronautics Board (the "CAB") in the Bankruptcy Court seeking to enjoin the CAB from revoking, under § 401(g)(3) of the Federal Aviation Act of 1958, as amended, Braniff's certificate of public convenience and necessity to engage in air transportation over the Dallas/Fort Worth-London route and to require the CAB to designate Braniff as the sole United States flag carrier on that route. On December 29, 1982, Petitioner, which had been granted authority by the CAB to serve the Dallas/Fort Worth-London route in place of Braniff, filed a motion to intervene in the Adversary Proceeding. The motion was granted by a December 29, 1982 order of the Bankruptcy Court.

On January 11, 1983, Petitioner filed a motion in the District Court to revoke the Local Rule's automatic reference of the Adversary Proceeding to Bankruptcy Judge Flowers. On January 14, 1983, the District Court entered an order which: (1) held the Local Rule constitutional and valid in all respects; (2) held the District Court to have jurisdiction over bankruptcy matters and proceedings pursuant to Sections 1331, 1332, 1334 and 1471 of Title 28 of the United States Code; (3) revoked the reference effected

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[1]The Braniff Chapter 11 case, consolidated for administrative purposes with the Chapter 11 case of its affiliate Braniff International Corporation, was assigned to The Honorable John Flowers, United States Bankruptcy Judge. Braniff is the only major U.S. airline to have filed Chapter 11 proceedings. Braniff has approximately $460 million in assets and $1.2 billion in debts. Braniff is a publicly-held corporation with more than 75,000 creditors and shareholders.

under the Local Rule; and (4) referred the entire Chapter 11 case of *In re Braniff Airways, Incorporated, et al.*, including all civil proceedings arising therein or related thereto, to Bankruptcy Judge Flowers with instructions to exercise powers and carry out functions identical to those delineated in the Local Rule. The January 14, 1983 order was certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) by order of District Court Judge Mahon on January 18, 1983. On January 20, 1983, Judge Mahon issued a Memorandum Opinion in support of the January 14, 1983 order.

A hearing in the Adversary Proceeding was held February 16, 1983. Supplemental briefing was requested by Bankruptcy Judge Flowers, and he is expected to enter his order shortly.

During the pendency of the Adversary Proceeding, Braniff has brought numerous other matters and proceedings before Bankruptcy Judge Flowers, including the December 23, 1982 "Application For Order Setting Hearing to Consider Agreement with Pacific Southwest Airlines." The application sought approval by the Bankruptcy Court of a multi-million dollar lease, sale and loan agreement between Pacific Southwest Airlines ("PSA") and Braniff dated December 22, 1982 (the "Agreement"), which required Braniff, *inter alia*, to transfer or cause to be transferred to PSA certain airport landing rights ("slots"). In addition, Braniff sought approval of a comprehensive compromise and settlement by and among Braniff, its secured creditors, and its unsecured creditors (the "Memorandum").

On January 14, 1983, at the commencement of the hearing before Bankruptcy Judge Flowers to consider approval of the Agreement and Memorandum, Petitioner and numerous other parties objected to the Bankruptcy Court's jurisdiction to approve the Agreement and the Memorandum. On January 15, 1983, Bankruptcy Judge Flowers entered an order overruling the objections to the jurisdiction of the Bank-

ruptcy Court. On appeal, District Judge Mahon, by order dated January 21, 1983, affirmed the January 15, 1983 order of Bankruptcy Judge Flowers and concurrently certified the January 21, 1983 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

On January 25, 1983, Petitioner, seeking appeal of the January 21, 1983 order and the January 14, 1983 order, filed a Petition for Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), which was granted by the United States Court of Appeals for the Fifth Circuit on January 31, 1983. On February 28, 1983, the Court of Appeals, in a per curiam opinion, affirmed the judgment of the District Court essentially for the reasons stated in the January 20, 1983 District Court opinion, and specifically held that 28 U.S.C. §§ 1471(a) and (b) were not invalidated by *Marathon* and, in any case, 28 U.S.C. § 1334 remained a presently effective jurisdictional grant.

On February 1, 1983, after eleven days of hearing, Bankruptcy Judge Flowers entered an order approving the Agreement and the Memorandum. On February 18, 1983, after conducting a three-day *de novo* review hearing, the District Court affirmed the February 1, 1983 order of Bankruptcy Judge Flowers.

The February 18, 1983 order approving the Agreement and Memorandum was appealed to the United States Court of Appeals for the Fifth Circuit by Petitioner and numerous other parties. On March 2, 1983, the Court of Appeals for the Fifth Circuit reversed the February 18, 1983 order of the District Court and remanded the case for further proceedings consistent with its opinion. Braniff has filed a petition for rehearing *in banc* with the Court of Appeals for the Fifth Circuit.

Petitioner seeks a writ of certiorari to review the February 28, 1983 order of the Court of Appeals for the Fifth Circuit affirming the District Court's jurisdiction over the entire Braniff Chapter 11 case, and the delegation of all such jurisdiction to the Bankruptcy Court.

REASONS FOR GRANTING WRIT.

A. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The questions presented in this case are of the utmost national importance. At stake is the administration of over 500,000 pending bankruptcy cases, involving billions of dollars,[2] in which orders are being entered by District Court judges and bankruptcy judges pursuant to the local rules without a jurisdictional foundation. The questionable validity of the local rules and the exercise of bankruptcy jurisdiction by the District Courts has created great uncertainty in the administration of the nation's bankruptcy laws. One District Court and several bankruptcy courts have held invalid local rules similar to the one at issue herein, while other District Courts and bankruptcy courts have upheld the validity of the local rules.[3] Notwithstanding the questionable validity of the local rules, the promulgation of the rules has

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[2]H.R. Rep. No. 807, 97th Cong. 2d Sess. 2, 60 (1982).

[3]In *In re Matlock Trailer Corp.*, No. 382-02778 slip op. at 20-21 (M.D. Tenn. Feb. 23, 1983), the district court held the respective local rule invalid because it did not meet the standards of Fed. R. Civ. P. 53 and because it effected an unconstitutional delegation of judicial power. Holding local rules invalid on the basis that no bankruptcy jurisdiction exists in either the district courts or the bankruptcy courts are: *In re Schear Realty & Investment Co.*, 1983 Bankr. L. Rep. (CCH) ¶ 68,949 (Bankr. S.D. Ohio 1982). *In re Conley*, No. 382-990 (Bankr. M.D. Tenn. Jan. 26, 1983) (not reported). *See also In re Trac Records*, 9 Bankr. Ct. Dec. 1011 (Bankr. N.D. Ga. 1982). Two bankruptcy court decisions finding a lack of bankruptcy jurisdiction in the district courts have been reversed on appeal. *See In re Color Craft Press Ltd.*, No. 82 PM-0974 (Bankr. D. Utah Feb. 7, 1983), *rev'd* No. 83-0140J (D. Utah Feb. 22, 1983); *In re Richardson*, No. 82 PC-0746 (Bankr. D. Utah Feb. 7, 1983), *rev'd* No. 83-0139J (D. Utah Feb. 22, 1983).

Holding that there is an existing grant of bankruptcy jurisdiction to the district courts are: *In re Jermoo's, Inc.*, No. 83-C-174-C (W.D. Wis. March 7, 1983); *In re Northland Point Partners*, Nos. 82-2277-W & 82-2332-W (E.D. Mich. Jan. 7, 1983) (not reported); *In re Johns-Manville Corp.*, No. 82-6221A (Bankr. S.D.N.Y. Jan. 10, 1983) (not reported); *In re Isis Foods, Inc.*, 9 Bankr. Ct. Dec. 1291 (Bankr. W. D. Mo. Jan. 5, 1983); *In re Brown*, 9 Bankr. Ct. Dec. 1276 (Bankr. W.D. Mo. Jan. 4, 1983).

lulled Congress into believing a legitimate basis currently exists for the exercise of bankruptcy jurisdiction and that, accordingly, there is no urgent need for it to enact a legislative remedy to the jurisdictional void created by *Marathon*.

A prompt decision by this Court is required in order to resolve the current uncertainty.[4] If this Court finds that the District Courts have bankruptcy jurisdiction and that the Local Rule properly delegates such jurisdiction to a non-Article III tribunal, certainty will be restored to the admin-

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[4]The interlocutory nature of the orders below should not deter this Court from granting a writ of certiorari to review the important questions presented in this case. Review of the subject orders is proper at the present stage of the proceeding because the important jurisdictional and constitutional questions presented are fundamental to the further conduct of this case. *See United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Land v. Dollar*, 330 U.S. 731 (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). Similarly, this Court has reviewed interlocutory orders by a writ of certiorari where "there was an insuperable objection to the maintenance of the suit in point of jurisdiction," *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and where a case presented a novel and important question affecting the administration of justice in the Court of Appeals, the resolution of which in favor of the petitioner would render void the decree of the Circuit Court, *American Construction Co. v. Jacksonville T & K.W.R. Co.*, 148 U.S. 372 (1893). These principles are equally applicable to the issues presented in the instant case.

The courts below, having certified the subject orders under Section 1292(b) of the Judicial Code, found the questions of law presented herein to involve controlling issues, the resolution of which would materially advance the termination of litigation. This Court has not hesitated to grant a writ of certiorari to review interlocutory orders that have been certified for interlocutory appeal under § 1292(b) where important and novel questions of federal law have been presented. *See, e.g., Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968); *Schnell v. Peter Eckrich & Sons*, 365 U.S. 260, 261 n. 2 (1961); *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).

Civil proceedings arising in or related to the Braniff Chapter 11 case are continuing to be adjudicated by the bankruptcy judge below. Delaying consideration of the fundamental issues presented in this case until a later stage of the proceeding would cause irreparable injury to petitioner and numerous other parties to proceedings being conducted in Braniff's Chapter 11 case, as well as to parties to the 500,000 other pending bankruptcy cases. Clearly, review by a writ of certiorari at this stage of the proceeding is necessary "to prevent extraordinary inconvenience and embarassment in the conduct of the cause." *American Construction Co. v. Jacksonville T & K.W.R. Co.*, 148 U.S. at 384.

istration of the nation's bankruptcy system, thereby disposing of the numerous challenges to the local rules that are now being made throughout the country. If this Court holds that the jurisdictional void created by *Marathon* cannot be cured by judicial fiat and that the Local Rule unconstitutionally delegates the essential attributes of judicial power to non-Article III judges, Congress surely will enact a legislative remedy to the jurisdictional void promptly.

B. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN MARATHON.

Although the important question decided by the Court of Appeals has not been expressly settled by this Court, the order affirming the existence of a statutory grant of bankruptcy jurisdiction to the District Court and the constitutionality and validity of the Local Rule is plainly in conflict with this Court's decision in *Marathon* in four respects. First, although *Marathon* invalidated the entire grant of bankruptcy jurisdiction contained in the Bankruptcy Reform Act, the Court of Appeals held that subsections (a) and (b) of Section 1471 of the Judicial Code are an existing source of bankruptcy jurisdiction exercisable by the district courts. Second, *Marathon* held unconstitutional the exercise of the essential attributes of judicial power — the entering of final orders — by the Article I bankruptcy judges where the claims being adjudicated arise under state law. The plurality opinion of Justice Brennan also made clear that even with respect to congressionally created rights, only those rights which are inherently public in nature may be initially adjudicated by a non-Article III forum. The Local Rule, however, permits bankruptcy judges to enter enforceable final orders in cases which involve the adjudication of rights created under state law and of congressionally-created rights not public in nature, clearly violating the Article III precepts

recognized in *Marathon*, Third, promulgation of the Local Rule conflicts with the mandate of *Marathon* that the restructuring of the bankruptcy laws is for Congress, not the judiciary, to undertake. Fourth, the two-tiered system created by the Local Rule conflicts with the recognition in *Marathon* that Congress intended trial court jurisdiction in bankruptcy matters be exercised in a single forum.

1. The Marathon Decision Invalidates the Entire Jurisdictional Grant Contained in the Bankruptcy Reform Act.

The *Marathon* decision held unconstitutional the jurisdictional grant in 28 U.S.C. § 1471, which in subsection (c) empowered Article I bankruptcy judges to exercise plenary jurisdiction in bankruptcy cases. Because the exercise of bankruptcy power by bankruptcy judges was an integral and non-severable part of a statutory scheme to eliminate the distinction between plenary and summary jurisdiction and to have all matters tried before the non-Article III bankruptcy judges, the plurality, joined by the concurring opinion of Justices Rehnquist and O'Connor, declined to transfer the *Marathon* proceeding to the civil docket of the District Court. In recognizing the non-severability of the three subsections of § 1471, Justice Brennan stated:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. *In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and ad-*

> *judicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis.* Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H.R. Rep. No. 95-595, *supra*, pp. 43-48; S. Rep. No. 95-989, p. 17 (1978). *Nor can we assume*, as the Chief Justice suggests, *post*, at 2, *that Congress' choice would be to have this case 'routed to the United States district court of which the bankruptcy court is an adjunct.' We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978* to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

102 S.Ct. at 2880 n. 40 (emphasis added).[5]

Although the *Marathon* decision did not have a majority opinion, six justices of this Court: (1) agreed that *Marathon* should be dismissed and not transferred to the civil docket of the District Court; (2) recognized that subsections 1471(a), (b) and (c) constituted a unitary and non-severable grant of jurisdiction to bankruptcy courts; and (3) held that it was for Congress, not the courts, to restructure the bankruptcy court system in a manner consistent with Article III and the legislative purposes of the Bankruptcy Reform Act. These determinative aspects of *Marathon* compel the conclusion that there remains under 28 U.S.C. §§ 1471(a) and

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[5]The concurring opinion of Justice Rehnquist, with whom Justice O'Connor joined, concluded as follows:

> Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see *ante* at 2880 n. 40, I concur in the judgment.

102 S.Ct. at 2882.

(b) no effective grant of bankruptcy jurisdiction to the District Courts.[6]

Because the power of the bankruptcy judge to hear and decide bankruptcy cases and proceedings derives from the Local Rule and the January 14, 1983 order incorporating the Local Rule, and because the District Court which promulgated the Local Rule and made the January 14, 1983 order is without jurisdiction over the bankruptcy case, the bankruptcy judge is without power to consider matters and proceedings arising in the *In re Braniff Airways, Incorporated, et al.* Chapter 11 case. The decision of the Court of Appeals must therefore be reversed.

2. The Local Rule Conflicts With the Mandate of Article III Recognized by Marathon.

Under the Local Rule, bankruptcy judges may enter final orders, effective upon entry, in those matters not denominated "related proceedings." Included within those matters in which the bankruptcy judges are authorized to enter final orders are claims, counterclaims, fraudulent conveyances, preferences and other private rights involving matters in which the state law provides the rule of decision or significantly impacts the rule of decision.[7] Because these matters

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[6]In contrasting the adjunct schemes upheld in prior decisions with the judicial power vested in the "adjunct" bankruptcy court, Justice Brennan stated that the " 'adjunct' bankruptcy courts created by the Act exercise jurisdiction behind a facade of a grant to the district courts." 102 S.Ct. at 2879. Justice Brennan earlier had noted that "the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts." 102 S.Ct. at 2862. *See also In re Trac Records*, 9 Bankr. Ct. Dec. 1011, 1019 (Bankr. N.D. Ga. 1982) (entire grant of jurisdiction in Section 241(a) of the Bankruptcy Reform Act invalidated by *Marathon*, and no post-*Marathon* bankruptcy jurisdiction is retained by the district courts).

[7]The distinction maintained between related proceedings and core proceedings under the Local Rule does not parallel the Bankruptcy Act distinction of plenary and summary jurisdiction. With respect to straight bankruptcy cases, summary jurisdiction under the Bankruptcy Act did not include fraudulent conveyances, preferences, and other matters which are encompassed within the "core" proceedings definition. Justice Justice Brennan suggested in *Marathon* that even the exercise of summary jurisdiction under the Bankruptcy Act was of questionable constitutionality. *See* 102 S.Ct. at 2876 n. 31 (broad powers exercised by referees under the Bankruptcy Act "have never been explicitly endorsed by this court"). *See also In re Trac Records*, 9 Bankr. Ct. Dec. 1011, 1019 (Bankr. N.D. Ga. 1982).

involve private rights created under state law, the authority conferred by the Local Rule to enter a final judgment which is enforceable unless stayed pending appeal violates Article III.

In affirming the constitutionality of the Local Rule, the Court of Appeals necessarily found that *Marathon* sanctions the entry of orders by bankruptcy judges in core proceedings because (1) the restructuring of debtor-creditor relations is a public right the adjudication of which may be assigned by Congress to an Article I judge; and (2) core proceedings as defined under the Local Rule involve the adjudication only of congressionally-created public rights. This finding is defective in two respects. First, the plurality in *Marathon* declared only that the *core* of bankruptcy power — the restructuring of debtor-creditor relations[8] — *may* be a public right.[9] The plurality opinion of Justice Brennan provided no further guidance on what part of the bankruptcy power may involve "public rights." Second, even assuming the term "public rights" encompasses certain fundamental rights created by the Bankruptcy Code, it is clear that the rights which may be adjudicated by the Article I bankruptcy judges in core matters fall well outside the realm of any such congressionally-created public rights.[10]

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[8]The discussion was in the narrow context of an argument that a discharge in bankruptcy is a public right. *See* 102 S.Ct. at 2871.

[9]102 S.Ct. at 2871. Later the plurality makes clear that it did not, contrary to the suggestion of Justice White in dissent, concede that all rights and duties created under federal law may be initially adjudicated by Article I courts. 102 S.Ct. at 2876 n. 32. Thus, it simply reaffirmed an earlier holding that *some* adjudicatory functions respecting federally created rights may be assigned to non-Art. III forums. *Id.*

[10]The Court of Appeals implicitly found that the Bankruptcy Court's consideration of the Agreement and Memorandum and whether to enjoin the CAB involve only that part of the restructuring of debtor-creditor relations that lies at the core of the federal bankruptcy power. This obviously is not so. Approval of the Agreement and Memorandum required the Bankruptcy Court to, among other things, construe contracts, adjudicate state-created property rights, and approve the settlement of state-created causes of action. Moreover, to the extent state law was not at issue, the rights created under the Bankruptcy Code involved whether to approve a transfer of assets between private parties, manifestly not something "public" in nature. Similarly, the issue in the Adversary Proceeding — whether to enjoin the CAB under Bankruptcy Code Section 105 from revoking a certificate that assertedly is property of the estate — in no sense involves the adjudication of public rights.

De novo determination by the District Court does not cure the Article III defect which exists under the Local Rule. *Marathon* makes clear that where a final judgment is entered by a non-Article III judge, with the burden on the appellant to obtain a stay pending appeal, the essential attributes of judicial power have been delegated irrespective of the scope of review accorded on appeal.[11]

3. The Local Rule and Reference Order Conflict With the Mandate of Marathon That Only Congress May Remedy the Present Jurisdictional Void.

The Local Rule and the specific order of reference dated January 14, 1983 (the "Reference Order") do by judicial fiat what this Court in *Marathon* expressly declined to do: judicially legislate a solution to the constitutional impediment to the pervasive jurisdiction granted to the Article I bankruptcy judges under the Bankruptcy Reform Act. In *Marathon*, Justice Brennan stated unequivocally that "it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978." 102 S.Ct. at 2880 n. 40. This Court attempted to prevent the present jurisdictional void by holding that its decision in *Marathon* would only apply prospectively as well as taking the unusual step of staying its judgment until October 4, 1982 ". . . to afford

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[11]Justice Brennan noted in *Marathon* that "the constitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal." 102 S.Ct. at 2879 n. 39.

In the proceedings below, Bankruptcy Judge Flowers' February 1, 1983 order approving the Agreement and Memorandum became effective immediately upon entry. Although Judge Flowers denied Petitioner's application for a stay, the parties, fortuitously, agreed not to close the transaction pendig review by the District Court. Bankruptcy Code Section 363(m) provides that unless stayed during appeal, the reversal on appeal of an authorization under Section 363(b) to sell or lease property of the estate does not affect the validity of such sale or lease to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal. Thus, absent the agreement not to close the transaction, Petitioner would have been foreclosed from any effective exercise of the "essential attributes of judicial power" by an Article III court.

Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S.Ct. at 2880. When Congress had not enacted a legislative solution to the problem, but appeared to be close, this Court took the extraordinary step of extending the stay until December 24, 1982. When this Court declined to further extend the stay, it fully realized the effect that entry of the *Marathon* judgment would have on the bankruptcy system. This Court undoubtedly determined that the judicial branch of government had done all it could to allow the legislative branch to painlessly remedy the problem caused by the unconstitutional jurisdictional grant in the Bankruptcy Reform Act, and it was unwilling to jeopardize its institutional credibility by granting yet another extension of the stay. The courts below have ignored the clear mandate of this Court to leave the solution to Congress.

4. The Local Rule and Reference Order Contravene the Congressional Intent Recognized in Marathon.

Assuming, *arguendo*, that Congress intended the district court to be vested with trial court jurisdiction in the event the grant of bankruptcy court jurisdiction in the Bankruptcy Reform Act was found unconstitutional, the Local Rule plainly is inconsistent with such Congressional intent. As recognized in *Marathon*, the legislative history makes clear that a primary objective of the Bankruptcy Reform Act was to eliminate the summary/plenary jurisdiction distinction by centralizing all bankruptcy jurisdiction in a single forum.[12] The Rule recreates the very same jurisdictional disputes and

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[12]Justice Brennan noted in *Marathon* that "one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes." 102 S.Ct. at 2880 n. 40.

inefficiencies which Congress intended to eliminate by enacting the Bankruptcy Reform Act.[13]

C. THE DISTRICT COURT IS WITHOUT JURISDICTION OVER BANKRUPTCY CASES.

The Court of Appeals found that even if *Marathon* invalidated the entire jurisdictional grant contained in the Bankruptcy Reform Act, the following statutory sections provide an alternative source of bankruptcy jurisdiction exercisable by the District Courts: Sections 1331, 1332 and 1334 of the Judicial Code. These statutes provide no basis for asserting jurisdiction over bankruptcy cases.

1. Section 1331 Does Not Grant the District Court Jurisdiction Over Bankruptcy Cases.

The lower federal courts are courts of limited, not general, jurisdiction, and courts have consistently construed Section 1331 narrowly to accomplish the legislative purpose of restricting the availability of federal tribunals. Because federal courts are courts of limited jurisdiction, this Court has long recognized that "the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without jurisdiction till the contrary appears".

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[13]In reviewing the approval by Bankruptcy Judge Flowers of the Agreement, District Judge Mahon gave no deference to Judge Flowers' findings. Thus, the parties were forced to prepare for and undergo two separate lengthy *de novo* hearings with the initial trial in effect serving no adjudicatory purpose with respect to the findings made in the second trial. On the other hand, Petitioner must rely on Judge Mahon's statement that in the short time available to him he reviewed the entire record before the Bankruptcy Judge, eleven full days of trial. The validity of the Local Rule necessarily requires reliance on a presumption that all district judges will read the entire record on *de novo* review. Such reliance is, as demonstrated above, insufficient grounds to find that District Courts have not delegated the essential attributes of judicial power to the bankruptcy judges.

Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 11 (1799).[14]

Federal question jurisdiction, Section 1331 of the Judicial Code, grants District Courts jurisdiction over all "civil actions arising under . . . laws . . . of the United States." The federal question jurisdiction granted in Section 1331 has, except for changes in the amount in controversy requirement, been defined the same way since 1875.[15] Federal question jurisdiction granted under Section 1331 and its predecessor was never intended to include a grant of jurisdiction over bankruptcy matters and proceedings.[16] Every bankruptcy law enacted by Congress has included an express and carefully delineated grant of bankruptcy jurisdiction to the District Court.[17] Bankruptcy matters are *sui generis*, involving a supervisory process over the estate of the debtor that combines judicial and administrative functions in a manner wholly inconsistent with the prerequisite for invocation of federal question jurisdiction — the filing of a "civil action."[18] If Congress had intended federal question jurisdiction under Section 1331 to encompass jurisdiction over bankruptcy matters, it would not have enacted express

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[14]Thus, "the presumption in every stage of a cause [is] that it is without the jurisdiction of a court of the United States." *Lehigh Mining and Manufacturing Co. v. Kelly*, 160 U.S. 327, 337 (1895).

[15]*See* 94 Stat. 2369; 72 Stat. 415; 18 Stat. 470.

[16]Federal question jurisdiction plainly could not have provided a sufficient basis for bankruptcy jurisdiction prior to the 1980 elimination of the amount in controversy requirement effected by Pub. L. No. 96-486.

[17]5 Stat. 446; 14 Stat. 517; 30 Stat. 545, 552; 92 Stat. 2668.

[18]*See* 28 U.S.C. § 1331; Fed. R. Civ. P. 3.

Moreover, federal question jurisdiction exists only where federal law provides the rule of decision. Many aspects of bankruptcy law apply state rules of decision. For example, a court determining the allowability of claims (11 U.S.C. § 502(b)(1)), the enforceability of subordination agreements (11 U.S.C. § 510), the validity of security interests (11 U.S.C. §§ 544, 545, 546), and what constitutes property of the estate (11 U.S.C. § 541), wholly or primarily applies state law for the rule of decision.

grants of bankruptcy jurisdiction in each bankruptcy law it has enacted.

This Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), unequivocally answered in the negative an assertion that federal question jurisdiction under Section 1331 includes every claim which arises under federal law, irrespective of the existence of other specifically applicable sources of jurisdiction. There, the plaintiff had urged that federal question jurisdiction included maritime claims which arose under federal law. In rejecting the contention that federal question includes admiralty jurisdiction, this Court stated:

> But neither the aim of the act of 1875 [the predecessor of present 28 U.S.C. Section 1331] to provide a forum for the vindiction of new federally created rights, nor the pressures which led to its enactment, suggest, even remotely, the inclusion of maritime claims within the scope of that statute. The provision of the act of 1875 with which we are concerned was designed to give a new content of jurisdiction to federal courts, not to reaffirm one long-established, smoothly functioning since 1789.

358 U.S. at 368.

Thus, this Court found it dispositive that Congress, as with bankruptcy jurisdiction, had always enacted separate statutory grants of admiralty jurisdiction, both before and after the creation of federal question jurisdiction in 1875. The rationale that prevented this Court in *Romero* from finding that federal question jurisdiction encompassed admiralty jurisdiction is equally applicable to the argument that federal question jurisdiction encompasses bankruptcy jurisdiction. *Romero* compels the conclusion that federal question jurisdiction does not include, and has never included, bankruptcy jurisdiction.

2. Old Section 1334 Is Not a Presently Effective Grant to the District Court of Bankruptcy Jurisdiction.

The Court of Appeals specifically found that the District Court currently has jurisdiction under old Section 1334 of the Judicial Code. This holding ignores the structure of the court system created under the Bankruptcy Reform Act.

Old Section 1334 conferred upon the District Courts "original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334 (1976). The Court of Appeals found that Congress intended this grant of "summary jurisdiction" to apply to cases commenced under the Bankruptcy Code ("Code Cases") during the transition period. Not surprisingly, not a single citation to the legislative history of the Bankruptcy Reform Act has been or can be produced in support of this assertion. The reason is clear: Congress could not have intended Code Cases be subject to summary jurisdiction. Moreover, there is no support or logic in the position that Congress intended the summary jurisdiction conferred upon bankruptcy courts under the Bankruptcy Act of 1898 to apply in Code Cases alongside the wholly inconsistent provisions of the Bankruptcy Reform Act which vest plenary trial court jurisdiction in the bankruptcy courts and appellate jurisdiction in the District Courts.

Courts have found that the transition provisions of the Bankruptcy Reform Act regarding the effective date of particular enactments should not be construed in an overly technical manner where to do so would subvert the intent of Congress. In analyzing a gap in the effective dates of statutes governing the dischargeability of student loans, the court in *New York State Higher Education Services Corp. v. Adamo*, 619 F.2d 216 (2d Cir. 1980), stated:

> We conclude that the hiatus between [the repeal of the former statute and the effective date of its successor] was purely a manifestation of congressional inadvertence and that to follow blindly the plain meaning of

> the statute without regard to the obvious intention of Congress would create an absurd result in accord with neither established principles of statutory construction nor common sense. . . .
>
> Analysis of the legislative history of the [Bankruptcy Reform Act] supports appellant's contention that the failure of the effective dates of the repeal and replacement statutes to coincide resulted from a mistake of Congress.

619 F.2d at 219. In language which is equally applicable to a purported intention of Congress to continue during the transition period the summary jurisdiction granted district courts under old Section 1334, the court, holding that it would not follow a construction which produced an unintended result, stated that:

> There is no indication in the history of the [Bankruptcy Reform Act] that Congress intended to legislate such an inconsistency or that it sought for some unexpressed reason to create an approximately eleven month hiatus. . . .

619 F.2d at 220.

New Section 1334 respecting appellate jurisdiction of the District Court is presently effective under Section 405(c)(2) of the Bankruptcy Reform Act. Several courts have noted that during transition the only bankruptcy jurisdiction that can be exercised by District Courts with respect to cases commenced on or after October 1, 1979 is that found in the new Section 1334.[19]

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[19]*See, e.g., Maiorino v. Branford Sav. Bank*, 691 F.2d 89 (2d Cir. 1982) (§ 405(c)(2) of the Bankruptcy Reform Act grants to the District Courts the same jurisdiction over appeals from decisions of bankruptcy judges that will apply after the transition period; although certain transition provisions which were hastily drawn during an eleventh hour compromise produced apparently inadvertent inconsistencies in the statute, construction of § 405(c)(1) that would lead to incongruous and anomalous result should be avoided absent some evidence that Congress deliberately intended such result). *Accord In re Callister*, 673 F.2d 305 (10th Cir. 1982); *In re Kutner*, 656 F.2d 1107 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *In re Wolf*, Bankr. L. Rep. (CCH) ¶ 67,947 (Bankr. D. Mass. 1981).

Congress plainly could not have intended the grant of summary jurisdiction[20] under old Section 1334 to apply to Code Cases alongside the plenary grant of trial court jurisdiction to the bankruptcy judges and the grant of appellate jurisdiction to the District Courts. The existence of a jurisdictional void does not grant to the judiciary a license to override Congressional intent. Old Section 1334 clearly is not a presently effective grant to the District Courts of jurisdiction over bankruptcy matters and proceedings.[21]

D. THE DISTRICT COURT WAS WITHOUT AUTHORITY TO PROMULGATE THE LOCAL RULE OR ORDER THE SPECIFIC REFERENCE.

Several sources were asserted by the courts below as authority for the promulgation of the Local Rule and the entry of the Reference Order.[22] As will be demonstrated, none of these sources permit the District Court to promulgate the Local Rule or to specifically refer an entire Chapter 11 case with instructions to exercise powers and carry out functions identical to those delegated under the Local Rule.

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[20]Even if old Section 1334 applies to Code Cases, the jurisdiction is limited to summary jurisdiction. At least a portion of the relief sought by the Respondent in the Bankruptcy Court is not within the summary jurisdiction of old Section 1334. Landing rights at airports ("slots") are not property in the "actual or constructive possession" of Braniff; instead, the slots are an intangible over which the FAA makes a substantial adverse claim. While a panel of the Fifth Circuit has held that slots are not property of the estate, Respondent has not yet exhausted its appellate remedies with respect to this finding.

[21]For those proceedings not arising under federal law, the District Court in its Memorandum Opinion relies on the diversity jurisdiction granted under 28 U.S.C. § 1332 for a basis of rounding out the jurisdiction of the District Court to make it consistent with the broad invalidated jurisdictional grant of 28 U.S.C. § 1471. Diversity jurisdiction requires complete diversity between all plaintiffs and all defendants. No diversity exists between the Petitioner and Respondent, both of which have their principal place of business in Texas. 28 U.S.C. § 1332(c).

[22]The Opinion of the District Court identified Section 105 of the Bankruptcy Code, Bankruptcy Rule 927, Section 2071 of the Judicial Code, and the inherent power of the District Court as sources of authority for promulgation of the Local Rule or for issuance of the order specifically referring the entire Chapter 11 case.

1. Rule 83 Does Not Authorize Promulgation of the Local Rule.

(a) The Local Rule Exceeds the Scope of Authority Conferred by Fed. R. Civ. P. 83.

One asserted basis for the promulgation of the Local Rule is Rule 83 of the Federal Rules of Civil Procedure.[23] Rule 83 authorizes each district court to "make and amend rules governing its practice not inconsistent with these rules." Fed. R. Civ. P. 83. In *Miner v. Atlass*, 363 U.S. 641 (1960), this Court addressed the validity of a local rule adopted by a District Court that provided for the taking of depositions in admiralty cases. In striking down the local rule, this Court held that "basic procedural innovations" are beyond the local rule-making power.[24] A delegation to Article I judges of ultimate decision-making authority in connection with a blanket reference of all bankruptcy cases and proceedings

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[23]Bankruptcy Rule 927 has also been urged as a source of authority for the Local Rule. The following discussion of Rule 83 is equally applicable to Bankruptcy Rule 927, except that with respect to Bankruptcy Rule 927 there is an additional issue of whether it is of continuing vitality. *See* Pub. L. No. 95-598, § 405(d).

Section 2071 of the Judicial Code, which authorizes courts to "prescribe rules for the conduct of their business," and Section 332 of the Judicial Code, which authorizes the Judicial Councils of the Circuits to "make all necessary and appropriate orders for the effective and expeditious administration of justice," provide no authority for promulgation of the Local Rule for reasons substantially similar to those set forth in the following discussion of Rule 83.

Section 105 of the Bankruptcy Code has also been asserted as a possible source of authority. Its purpose is to permit courts to make orders in specific cases, primarily to protect its custody of the estate and to aid its administration of the estate. *Cf.* 1 *Collier on Bankruptcy*, ¶ 2.61 (14th ed. 1974) (discussing predecessor to § 105, § 2(a)(15) of the Bankruptcy Act of 1898). Section 105 has absolutely no application to the promulgation of the Local Rule.

[24]In *Colgrove v. Battin*, 413 U.S. 149 (1973), this Court noted that a "basic procedural innovation" was one that bore on the ultimate outcome of the litigation. If the delegation to a non-Art. III judge of the authority to enter final orders does not bear on the "ultimate outcome of the litigation," this Court in *Marathon* would not have held that Section 241(a) of the Bankruptcy Reform Act unconstitutionally delegated the essential attributes of judicial power in giving ultimate decision-making authority to the Art. I bankruptcy judges.

manifestly is a "basic procedural innovation" beyond the scope of the authority conferred by Rule 83.[25]

(b) The Local Rule Is Inconsistent With Rule 53.

Local rules that are inconsistent with the Federal Rules of Civil Procedure are invalid under Rule 83. Rule 53 applies to references of the kind contemplated in the Local Rule.

Under the Local Rule, a bankruptcy judge exercises precisely the powers contemplated by the definition of master contained in Rule 53(a), which "includes a *referee*, an auditor, and an examiner, a commissioner, and an assessor." Fed. R. Civ. P. 53(a) (emphasis added). In *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 32 (8th Cir. 1962), the court stated as follows:

> It will be noted that [Rule 53] is directed at the use of reference as a procedural vehicle in general. Every reference to a master, no matter what the litigation incident involved may be, and regardless of what may be the form or scope of the task sought to be referred, is within the application of the Rule.

However, the grounds for a reference enumerated in Fed. R. Civ. P. 53(b) are limited:

> A reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

The authority to order a reference under Rule 53 was narrowly circumscribed in *LaBuy v. Howes Leather Co., Inc.*, 352 U.S. 249 (1957), where the District Court appointed a master in two related antitrust cases involving 87

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[25] *Cf.* Fed. R. Civ. P. 82 ("[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts"); *Owen Equipment & Electric Co. v. Kroger*, 437 U.S. 365, 370 (1978) ("it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw jurisdiction"); *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941) (this Court has no authority to prescribe rules which enlarge or diminish the jurisdiction of federal courts).

plaintiffs and 6 defendants. In affirming the issuance of a writ of mandamus requiring the District Court to vacate its order of reference, this Court declared that calendar congestion, unusual complexity of issues, and the great length of time required for trial did not constitute exceptional grounds warranting the reference to a master. 352 U.S. at 259.[26] Plainly, the exceptional grounds sufficient to warrant a reference of an entire Chapter II case have not been demonstrated here.

Not only does the Local Rule violate the limitations of Rule 53(b), it is also inconsistent with Rule 53(e). Under Rule 53(e)(2) the court in non-jury actions "shall accept the master's findings of fact unless clearly erroneous." Local Rule Section (e)(2)(B) provides for *de novo* review by the District Court, which need not give deference to the bankruptcy judge's findings. More importantly, under Rule 53(e), a master only makes a report to the District Court, which is exclusively authorized to enter final orders and judgments. Under the Local Rule, bankruptcy judges enter final orders enforceable upon entry unless stayed pending appeal. This plainly conflicts with this Court's declaration in *LaBuy* that "[t]he use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause' . . . and not to displace the court." 352 U.S. at 256.

2. The District Court Had No Inherent Authority to Promulgate the Local Rule or Order the Specific Reference.

Another possible source of support for the Local Rule or the Reference Order is the inherent authority of the District Court to appoint auditors or experts. In order for the Local

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[26] *See also Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967) (delay on the part of defendants, and the variety, number and complicated nature of the problems and issues involved, did not amount to an exceptional circumstance to justify an appointment of a master to supervise answers to interrogatories).

Rule or the Reference Order to be within the inherent power of the District Court, the Rule or the Order must (1) be within the scope of the inherent authority; and (2) not be contrary to legislation. *Ex Parte Peterson*, 253 U.S. 300, 312-13 (1920). Neither condition is satisfied here.

(a) The Rule and the Reference Order Are Beyond the Inherent Power of the District Court.

The inherent authority recognized in *Peterson* provides no basis for the promulgation of a rule effecting a blanket reference to bankruptcy judges of all bankruptcy cases and proceedings nor an order specifically referring an entire Chapter 11 case and all proceedings arising in or related thereto. In *Peterson*, this Court recognized the inherent authority of a District Court to appoint an auditor to conduct a preliminary hearing for the purpose of reviewing lengthy records, identifying items in dispute, and expressing an opinion upon the items found to be in dispute, but not finally determining any of the issues, the final determination of which was to be made by the jury at trial.

In discussing the court's inherent power, this Court stated:

> Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties as they may arise in the progress of a cause. . . . 'It is a reference to "auditors,"— a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree but prepare materials on which a decree is to be made.'

253 U.S. at 312-13 (citations omitted).

Peterson and the cases relying on it involve the inherent power of a trial court to appoint agents to make preliminary findings and to provide expert guidance to the court. None

of the cases discussing the inherent authority of the court involve the delegation of ultimate judicial decision-making that is effected under the Local Rule. A delegation of authority to the bankruptcy judge to enter final orders and judgments is not within the inherent authority recognized in *Peterson*.

(b) Rule 53 Limits the Inherent Power of the District Court.

This Court in *Peterson* expressly recognized that inherent power is subject to limitations imposed by legislation. Because Fed. R. Civ. P. 53 governs references of the kind contemplated by the Local Rule and the Reference Order, it is an express limitation on the inherent power of the District Court. The District Court may not rely on inherent power to create a system that differs from, yet parallels, the Rule 53 treatment of masters.

CONCLUSION.

Marathon's invalidation of the non-severable jurisdictional grant of the Bankruptcy Reform Act and the absence of curative Congressional action have closed the doors of the federal courts to bankruptcy matters. This Court recognized and postponed that result by staying its judgment as long as it could. When the stay expired, so did the judicial power of the courts of the United States to postpone the result. Now Congress must take full responsibility for all the resulting disruption. When Congress realizes that it must act, presumably it will. But no parade of horribles can justify destroying the basic cornerstone of our Constitutional system of government — separation of powers.

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari and should reverse the Order affirming the validity and constitutionality of the Local Rule.

Dated: April 1, 1983.

Respectfully submitted,

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APPENDIX A.

Decision of the Court of Appeals.

United States Court of Appeals for the Fifth Circuit.

No. 83-1048.

In the Matter of: Braniff Airways, Inc., et al., Debtor.

Braniff Airways, Inc., et al., Plaintiffs-Appellees, versus Civil Aeronautics Board, Defendant, American Airlines, Inc., Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

(FEBRUARY 28, 1983).

Before GEE, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

We affirm the judgment of the District Court, essentially for the reasons stated in its memorandum opinion. We add, in particular, that we conclude that 28 United States Code §§147(a) and (b) were not invalidated by the *Marathon* decision,[1] but if they were, nevertheless, the jurisdictional grant of 28 United States Code §1334 remains effective during the transitional period.

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[1]The Northern Pipeline Construction Co. v. Marathon Pipeline Co., ___ U.S. ___, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

APPENDIX B.

Order.

In the United States District Court for the Northern District of Texas Fort Worth Division.

In re: Braniff Airways, Incorporated, et al.

Braniff Airways, Incorporated, et al. vs. Civil Aeronautics Board.

Miscellaneous No. 4-221-E. (Fort Worth Bankruptcy No. 4-82-00369).

Filed: January 14, 1983.

This case came before the Court on a motion to revoke the reference to United States Bankruptcy Judge John Flowers of *In re Braniff Airways, Inc., et al.*, Fort Worth Bankruptcy Division Case No. 4-82-00369. After considering the motion, brief and oral argument of counsel, the Court makes the following rulings:

1. The Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings adopted by the United States District Court for the Northern District of Texas on December 21, 1982, is constitutional and valid.

2. The Court has jurisdiction over bankruptcy matters and proceedings, including this case, pursuant to sections 1331, 1332, 1334 and 1471 of Title 28 of the United States Code.

3. To avoid any possible jurisdictional attack based on the adoption and promulgation of the Local Rule, and in order to provide certainty in the resolution of this exceptional and complicated case, the reference of this case to Bankruptcy Judge Flowers is hereby withdrawn.

4. The Court finds that there are exceptional conditions and circumstances in *In re Braniff Airways, Inc.*, including, but not limited to the following:

> The case was filed on May 13, 1982, and has been through eight (8) months of proceedings before the Honorable John Flowers.

Braniff is the only major airline to go into Chapter 11 bankruptcy reorganization.

The debtor, Braniff, has approximately $460 million in assets and $1.2 billion in debts.

Some of this debt is publicly-held. Braniff is a publicly-held corporation. In fact, Braniff has more than 75,000 creditors and shareholders.

More than 100 lawyers are already involved in these proceedings.

There is much equipment, formerly used by the debtor, now sitting idle.

The most exceptional circumstance is that Judge Flowers has dedicated eight months of work to this case. Thus, he has singular knowledge and expertise as to the facts and law in this most complicated case.

Although each of these facts was not specifically presented in the motions, briefs and arguments before this Court, the Court has taken judicial knowledge of these and other matters on file in the Bankruptcy Clerk's Office.

5. It would be a travesty of justice for this Court to leave unprotected the rights of creditors, shareholders and interested parties. Justice demands that this case quickly proceed to an orderly and final conclusion.

6. Therefore, pursuant to this Court's statutory and general *equitable* powers, and the Federal Rules of Civil Procedure, and due to the exceptional circumstances in this case, the Court hereby ORDERS that the entire matter of *In re Braniff Airways, Inc., et al.*, to the extent this Court has jurisdiction, is referred to the Honorable John Flowers, Bankruptcy Judge for the Northern District of Texas, Forth Worth Division. The powers and functions to be exercised by Judge Flowers under this reference are identical to those delineated in the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings, adopted on December 21, 1982.

The Court reserves the right to enter further findings on this matter.

Signed this 14th day January, 1983.

/s/ Eldon B. Mahon
UNITED STATES DISTRICT JUDGE

APPENDIX C.

Memorandum Opinion.

In the United States District Court for the Northern District of Texas, Fort Worth Division.

In re: Braniff Airways, Incorporated, et al.

Braniff Airways, Incorporated, et al. vs. Civil Aeronautics Board.

Miscellaneous No. 4-221-E. (Ft. Worth Bankruptcy No. 4-82-00369).

A hearing was held on January 13, 1983, concerning a "Motion to Revoke Reference of Adversary Proceedings" filed on January 11, 1983 by American Airlines, Inc., a corporation and an intervenor in the above-captioned proceeding pending before the Fort Worth Bankruptcy Division of this Court. The Court entered an Order on January 14, 1983 holding that the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings adopted by the United States District Court for the Northern District of Texas on December 21, 1982,[1] is constitutional and valid, and further holding that the Court has jurisdiction over bankruptcy cases and proceedings, including the one presently before it, pursuant to sections 1331, 1332, 1334, and 1471 of Title 28 of the United States Code. In support of that Order, the Court will now elaborate on its reasons by addressing: (1) The Court's Jurisdiction, (2) *Marathon's* Effect on the "Structure" of the Bankruptcy System, (3) The Court's Statutory and Equitable Powers, and (4) The Referral of the Braniff Bankruptcy Proceeding to the Bankruptcy Judge.

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[1]The stay of the United States Supreme Court of the effect of its decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), expired on Dec. 24, 1982. Thus, the Local Rule became effective on December 25, 1982.

I. *The Court's Jurisdiction*

A. 28 U.S.C. § 1471.

The United States Supreme Court invalidated at least a portion of 28 U.S.C. § 1471 in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982) (hereinafter called *Marathon*). In his plurality opinion, Justice Brennan states:

> We conclude that § 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

Marathon at 2879-80.[2] By stating that the power was "impermissibly removed" from the district court, the Supreme Court clearly indicates that jurisdiction was first vested in the Art. III district court pursuant to § 1471(a), and it expresses no disapproval of this grant of jurisdiction to the district court.

The next sentence and footnote of the plurality opinion, however, have led to some confusion over what parts of § 1471 were invalidated. Justice Brennan continues:

> Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act.

Marathon at 2880.

In his use of the words "bankruptcy courts" in *Marathon*, Justice Brennan makes a distinction between bankruptcy

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[2]Section 241(a) of the Bankruptcy Reform Act of 1978 includes not only the jurisdictional grants in 28 U.S.C. § 1471, but also venue, removal and other procedural matters. The Supreme Court decision in *Marathon* addresses only the jurisdictional grants of § 1471, which is included in § 241(a).

courts and district courts. This should not be confused with the bankruptcy laws which define "courts of bankruptcy" to include the district courts. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 404(a), 92 Stat. 2549, 2683 (1978). Thus, the "broad grant of jurisdiction to the bankruptcy courts" does not refer to the grant of jurisdiction to the district courts. Furthermore, in footnote 40, he states:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a *single statutory grant of jurisdiction.*

Marathon at 2880 n.40 (emphasis added). This Court interprets the phrase "single statutory grant of jurisdiction" as referring to the words "all of the jurisdiction" in § 1471(c). This grant of jurisdiction under § 1471(c) encompasses not only bankruptcy "cases" (*see* § 1471(a)) but also "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." 28 U.S.C. § 1471(b) (emphasis added). The Supreme Court's conclusion that at least some of the "related to" matters must be heard by an Art. III court meant that the words "all of the jurisdiction" contain both constitutional and unconstitutional grants of jurisdiction to the bankruptcy courts. Thus, an attempt to separate and remove the unconstitutional part of the bankruptcy court's jurisdiction from the constitutional part of its jurisdiction would be no easy feat. Facing such a difficulty, and examining the intent of Congress in § 1471(c), Justice Brennan continues his footnote:

> In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction *of the bankruptcy court over these matters, leaving the jurisdic-*

> *tional provision* [in the bankruptcy court] *and adjudicatory structure intact with respect to other types of claims*, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes.

Marathon at 2880 n.40 (emphasis added).

Finally, Justice Brennan concludes the footnote:

> Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 2, that Congress' choice would be to have *this case* "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

Marathon at 2880 n.40 (emphasis added). The difficulty was *not* in separating § 1471(c) from § 1471(a) and (b), but in separating jurisdiction over "this case," *i.e.* a case like *Marathon*, requiring an Art. III court, from the other appropriate jurisdiction of the bankruptcy court over non-Art. III matters, all of which were combined in the words "all of the jurisdiction" in 28 U.S.C. § 1471(c). Therefore, this Court concludes that the Supreme Court never intended to invalidate, nor did it invalidate 28 U.S.C. § 1471(a) and (b), and that *Marathon* only held 28 U.S.C § 1471(c) unconstitutional.[3]

B. 28 U.S.C § 1334, § 1331, and § 1332.

In light of the debate surrounding the continued validity of 28 U.S.C. § 1471(a) and (b), the Court will also address the question of its jurisdiction over bankruptcy cases and

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[3]*See United States v. One 1974 Rockwell Aerocommander*, Civ. No. 4-80-289-E, at 5 n.2 (N.D. Tex. Jan. 11, 1982), where, in an unpublished union, this Court held subsection (c) to be the "fatal flaw" in section 1471.

proceedings assuming *arguendo* that 28 U.S.C. § 1471 is no longer valid. During the transition period (from October 1, 1979, through March 31, 1984), Congress clearly intended for both the old and new versions of 28 U.S.C. § 1334 to exist simultaneously. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 402, 403, 404, 92 Stat. 2549, 2682-83 (1978). The old § 1334 stated: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334. It may be argued that Congress, in writing the new version of 28 U.S.C. § 1334 (making district courts the courts of appeals for final judgments, orders, and decrees of bankruptcy courts absent an appointed bankruptcy judge panel), intended that the old § 1334 would only apply to cases filed before October 1, 1979.

However, if the new grant of original and exclusive jurisdiction in 28 U.S.C. § 1471(a) — which was meant to repeal and replace the old § 1334 for cases filed after October 1, 1979 — is unconstitutional and no longer valid, the Court must now read the bankruptcy laws as if the new § 1471 had not been written. *See Frost v. Corporation Comm'n of Oklahoma*, 278 U.S. 515, 526-27 (1929); *Davis v. Wallace*, 257 U.S. 478, 485 (1922). In so doing, the Court finds that the old § 1334 places the original and exclusive jurisdiction over bankruptcy matters and proceedings in the district court.

This jurisdiction under the old § 1334 was "summary jurisdiction" only. The Court must now look to 28 U.S.C. § 1331 and § 1332 for those cases which would have originated in the federal district court because of either a federal question involved or the diversity of citizenship of the parties. Those cases, now properly in the district court's jurisdiction, may be combined with the bankruptcy cases in which they arise or to which they are related for the purpose of referring both the bankruptcy "matters and proceedings" (in this court's jurisdiction under the old § 1334) and the

"arising in or related to" matters (in this court's jurisdiction under 28 U.S.C. § 1331 or § 1332) to the bankruptcy judge.[4]

II. *Marathon's Effect on the "Structure" of the Bankruptcy System*

Next, the Court turns to the question of what adjudicatory structure[5] remains intact after *Marathon*. During the transition period from October 1, 1979, through March 31, 1984, Congress intended the old structure (under the 1898 Bankruptcy Act) to exist concurrently with the new structure (under the 1978 Bankruptcy Reform Act).[6] Assuming *arguendo* that *Marathon* rendered the new bankruptcy structure unusable, the Court nevertheless has available an entire structure, left intact by Congress and *Marathon* and in existence through March 31, 1984, which may be used for the adjudication of bankruptcy cases and proceedings.

Counsel for American Airlines suggest that the Court, in promulgating the "Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings" is creating a subsidiary court ("Memorandum of Points and Authorities in Support of Motion to Revoke Reference of

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[4]The Court is aware of the assertion that the word "case" in 28 U.S.C. § 1471(a) is narrower than "all matters and proceedings in bankruptcy" in the old § 1334. *See* 1 *Collier Bankruptcy Manual* ¶ 3.01[1][a] (3d ed. 1982). However, *either* by combination of § 1471(a) and (b) — giving this court jurisdiction over both "cases under title 11" [§ 1471(a)] and "all civil proceedings arising under title 11 or arising in or related to cases under title 11" [§ 1471(b) *or* by the combination of bankruptcy "matters and proceedings" (old § 1334) and federal questions (§ 1331) and diversity suits (§ 1332), the Court concludes that it has jurisdiction over the matters now before it, as a basis for referring these matters to the bankruptcy judge. The parties in any civil proceedings which are "related to" bankruptcy cases, and which involve purely state law questions in which there is no diversity may raise such jurisdictional questions on a case by case basis (and only if § 1471(a) and (b) are no longer valid).

[5]*See* note 40 in *Marathon*.

[6]Bankruptcy Act of 1978, Pub. L. No. 95-598, §§ 404 & 405, 92 Stat. 2549, 2683-85 continues the old bankruptcy structure through March 31, 1984.

Adversary Proceedings" page 14). On the contrary, the Court is not "creating" anything, but is instead relying on and making use of an entire structure created by Congress, which will remain in existence through March 31, 1984, and which is already being used for the adjudication of cases filed before October 1, 1979. Furthermore, the Court disagrees with the suggestion that such a local rule, by using the presently existing bankruptcy structure, is in any way an "innovation" beyond the Court's local rule-making power. *See Miner v. Atlass*, 363 U.S. 641 (1960).

III. *The Court's Statutory and Equitable Powers*

Having found an existing bankruptcy court structure,[7] the Court will now address its authority to use this existing structure to adjudicate bankruptcy cases and proceedings.

A. Statutory Authority.

Title 11 of the United States Code, as amended by the Bankruptcy Reform Act of 1978, provides that the "bankruptcy court may issue any order . . . necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a), *as amended by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2555 (1978). As defined in section 404(a) of the same Act, federal district courts are included in the definition of bankruptcy courts. *Id.* § 404(a), 92 Stat. at 2683.

The Local Rule, promulgated in an attempt to carry out congressional intent, would be clearly valid if based solely on this congressional grant of authority. The Order establishing the local rule was "necessary . . . to carry out" the congressional intent expressed by the whole statutory scheme, and is an "appropriate" means of carrying out the expressed intent.

Bankruptcy Rule 927, continued at least for the "interim period," October 1, 1979, through March 31, 1984, *see*

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[7] *See* II. *supra*.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 402(b) & 404, 92 Stat. 2549, 2682-83 (1978), also authorizes adoption of local rules establishing court procedures. *See also* Fed. R. Civ. P. 83. The local rule adopted on December 21, 1982, would be, under this rule, a valid exercise of the Court's power to control procedure in the trial court.[8]

Finally, section 2071 of Title 28 of the United States Code allows courts the discretion to enact the rules under which they will conduct their business. As under the other statutory grants of authority mentioned above, this Court recognizes it is not legislating a solution to the bankruptcy problem, but merely implementing congressional intent under specific grants of authority.

B. Equitable Powers.

Since the murky beginnings of English jurisprudence, the common law courts have sought to provide justice. More recently, Roscoe Pound observed that our law has been guided by the principle that "all legal institutions and all legal rules [are] . . . measured by reason and . . . nothing could stand in law that could not maintain itself in reason." R. Pound, *The Spirit of the Common Law* 81. Pound concludes that the development of Law will be effected through a theory of "right and justice and [a] conscious attempt to

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[8]Bankruptcy Rule 927 and Fed. R. Civ. P. 83 both require that rules made under their authority are not to be "inconsistent with these rules." Nothing in the Local Rule is inconsistent with either the Federal Rules of Civil Procedure or the Bankruptcy Rules.

make the law conform to ideals." *Id.* at 84.[9] The practical application of this Court's attempts at justice, however, must be guided by the equity[10] jurisprudence of the United States.

Early decisions of the United States Supreme Court determined that "[t]here are certain powers inherent in the judicial office." *Nudd v. Burrows*, 91 U.S. (1 Otto) 426, 442 (1875). There is yet some doubt as to Congress' power to "trench upon the common-law powers" with which the judge is clothed. *Indianapolis & St. Louis R.R. v. Hors*, 93 U.S. (3 Otto) 291, 300 (1876). *See also Grimes Dry Goods Co. v. Malcolm*, 164 U.S. 483, 490 (1896); *Mutual Accident Assoc. v. Barry*, 131 U.S. 100, 120 (1889). In

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[9]Although the Constitution and laws of the United States define specific legal principles, equitable application of these principles depends on the application of common sense. Such common sense is reflected in the everyday events of the People. For example, the Court recalls the 1954 Cotton Bowl game involving the Universities of Rice and Alabama. As Dick Moegle of Rice sped along the sideline, heading for a certain score, Tommy Lewis leaped from the Alabama bench to tackle his opponent. Such interference was not covered by the collegiate rulebook, but the referee carried the ball to the goal line and awarded Rice a touchdown. This action illustrates the wisdom of the People in allowing officials to interpret the rules to result in a just decision. The referee "may enforce any penalty he considers equitable" to remedy unfair acts not covered by specific rules. *See* D. Nelson, *Illustrated Football Rules* 174 (Doubleday & Co. 1976).

The Court does not put sporting events on the same level as complex bankruptcy matters, but the wisdom reflected in this simple event illustrates the concept of "Natural Equity," defined as:

> equivalent to justice, honesty, or morality in business relations, or man's innate sense of right dealing and fair play. . . . the term "natural equity" may be understood to denote, in a general way, that which strikes the ordinary conscience and sense of justice as being fair, right, and equitable . . . .

Black's Law Dictionary 635 (4th ed. 1968).

[10]Equity is defined as

> Justice administered according to fairness as contrasted with the strictly formulated rules of common law . . . an alternative to the harsh rules of common law and . . . based on what was fair in a particular situation. . . . the spirit and habit of fairness, justness, and right dealing . . . . the object of which is to render the administration of justice more complete, by affording relief where the court of law are incompetent to give it . . . .

Black's Law Dictionary 484 (5th ed. 1979).

dispensing justice, this Court must be limited to its constitutional role — reaching neither into the legislative nor executive branches in its exercise of power. Nevertheless, the Court cannot shrink from its constitutional duty because of a lack of precise guidelines. *See Landwehr v. United States* (*In re Miller*), 485 F.2d 74 (5th Cir. 1973), *cert. denied*, 415 U.S. 990 (19...).

Congress has provided an intricate scheme within which bankruptcy disputes can be brought to just conclusions.[11] Congress has authorized the courts to make provisions for procedural matters. The inherent equitable power of the courts is in itself a demand that substantial justice be done. Therefore, pursuant to its equitable power the United States District Court for the Northern District of Texas adopted the Local Rule Concerning Bankruptcy Cases and Proceedings to achieve substantial justice. Pursuant to this Local Rule and, alternatively, pursuant to its inherent equitable powers, this Court referred *In re Braniff* to the bankruptcy judge.

In the courtroom of the United States Court of Appeals for the Fifth Circuit in Fort Worth, where this Court makes its attempt at dispensing substantial justice, one quote is inscribed in gold behind the bench of the Court:

REASON IS THE LIFE OF THE LAW
NAY, THE COMMON LAW ITSELF IS NOTHING
ELSE BUT REASON

If ever a case came before this Court commanding that Reason be sought and that Reason be applied to the ends of Justice — this is that case.

IV. *Referral of the Braniff Bankruptcy Proceeding to the Bankruptcy Judge*

The referral of the case involved in this dispute occurred immediately upon expiration of the Supreme Court's stay of *Marathon*.[12] Having determined the validity of the Local

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[11]*See* note 6 *supra*.
[12]*See* note 1 *supra*.

Rule adopted by the judges of the Northern District of Texas, it was not necessary to take any further action to have this case referred to the bankruptcy judge. Counsel for American Airlines, however, questioned the validity of the manner by which the judges adopted the Rule and the validity of the Rule's all-encompassing effect. In light of this challenge to the Rule, the Court chose to take additional action to protect the *Braniff* proceedings.

In re Braniff is an exceptional case,[13] and this Court determined that no effort should be spared in providing for a speedy and valid conclusion. Therefore, the Court withdrew the case, pursuant to the Local Rule,[14] found exceptional circumstances in this case, then referred the case to the Honorable E. John Flowers, Bankruptcy Judge for the Northern District of Texas, both under the provisions of the Local Rule and in the alternative, under the Court's equitable powers.[15] Judge Flowers is limited in his conduct of the case by provisions identical to those set forth in the Local Rule. Thus, any matter which could not constitutionally be decided by a non-Art. III judge, *see Marathon*, will not be decided by Judge Flowers.[16]

Continued validity of section 1471(a) and (b) would grant broad jurisdiction to the federal district court. Only matters that may be decided by a non-Art. III judge, however, were referred by the Court to the bankruptcy judge for final determination. This Court will make the final determination in all other matters. This action corrects the constitutional problem encountered in *Marathon*. If jurisdiction is based

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[13]*See In re Braniff*, Misc. No. 4-221-E, at 2 (N.D. Tex. Jan. 14, 1983).

[14]Were the Local Rule invalid, the case would have been properly in this Court. *See* I. *Supra*.

[15]*See* III. *supra*.

[16]Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings, Dec. 21, 1982, sec. (d)(3)(B).

solely on sections 1331, 1332 and 1334,[17] the jurisdiction of this Court would not be as broad as under section 1471. The reference to the bankruptcy judge would include at least "all matters and proceedings in bankruptcy." Any case "related to" the bankruptcy proceeding, although referred to the bankruptcy judge, will receive final determination in this Court, as clearly set forth in the limits on Judge Flowers' authority. *See In re Braniff*, Misc. No. 4-221-E, at 3 (N.D. Tex. Jan. 14, 1983); Local Rule, sec. (d)(3)(B).

It would be grossly unfair to all parties involved in bankruptcy matters if no Court exercised jurisdiction over these cases. Billions of dollars, as well as thousands of potential jobs may be lost, and the congressional intent to provide bankruptcy protection would be subverted, if all bankruptcies were abruptly halted. Clearly, Congress has not only shown its intent to create a two-tiered bankruptcy system, but also has provided the legislation by which this Court can allow the bankruptcy judge to exercise some of this Court's jurisdiction. In addition, equity demands, and makes provision for reference of cases in a posture similar to *Braniff*.

Judge Flowers has invested innumerable hours in reviewing the facts, circumstances and arguments in this case. To bring the case into the District Court now would mean the Court would start in the middle of the case without the benefit of Judge Flowers' admittedly unique expertise, obtained in the past eight months of *In re Braniff* proceedings. Although this Court could reserve the entire *In re Braniff* bankruptcy for its own determination, to do so would inevitably lead to some delay while the Court reviews the case

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[17]The automatic stay provision enacted by Congress, 11 U.S.C. § 3... still operates to halt most proceedings against debtors. Arguably, any suit to lift the stay is a federal question and cognizable under 28 U.S.C. § 1331.

merely to obtain the knowledge that Judge Flowers already possesses.[18]

Therefore, in order to protect the rights of creditors, stockholders, and all other parties who have depended on the bankruptcy laws' protection, and in order to provide speedy resolution of bankruptcy disputes, the Court has exercised its powers under congressional authority and under its inherent equitable power so that congressional intent may be implemented. This provision for bankruptcy cases (under the Local Rule) and for *Braniff* in particular (under the Local Rule and the inherent equitable powers of this Court) will allow orderly and final conclusion of all bankruptcy cases and proceedings.[19]

Signed this 20th day of January, 1983.

/s/ Eldon B. Mahon
UNITED STATES DISTRICT JUDGE

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[18]The excellent consideration of this case by Judge Flowers is reflected in the speedy and orderly manner in which the case has proceeded at all levels. That this matter came before the Court on a motion filed on January 11, 1983, which the Court heard on January 13 and disposed of by its Order of January 14 indicates that no undue delay has resulted from district court review of bankruptcy matters. Even *In re Braniff* — which certainly has a potential above the vast majority of bankruptcy matters to cause problems — has not been unduly delayed.

[19]During oral argument before this Court on Jan. 13, 1983, counsel for American Airlines also raised questions concerning the power of a bankruptcy court to make rulings affecting Civil Aeronautics Board proceedings. That issue was not addressed by counsel for American Airlines in the brief submitted to this Court, was not addressed by opposing counsel during oral argument, and is not addressed by this Court's opinion.

APPENDIX D.

Order of Certification.

In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

In re: Braniff Airways, Incorporated, et al. Misc. BK 4-83-1-E.

Filed: January 21, 1983.

On January 15, 1983, the Honorable John Flowers, United States Bankruptcy Judge entered an "Order on Jurisdiction" and on January 18, 1983, Judge Flowers signed an order stating his opinion that the question determined by that Court in its "Order on Jurisdiction" was "one over which a question of controlling law exists as to which there are substantial grounds for differences of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation." *See* "Order on Jurisdiction" page 4. Those Orders were filed in this Court on January 20, 1983, and this Court has reviewed said Orders pursuant to Local Rule (e)(3) of the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings.

The Court has determined that the questions of law addressed in the "Order on Jurisdiction" signed by Judge Flowers, were foreclosed by the decision rendered by this Court in an Order on January 14, 1983, holding that the United States Supreme Court's decision in *Northern Pipeline Construction Company v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982) does not destroy the jurisdiction of the United States District Courts over bankruptcy cases and proceedings.

This Court's Order of January 14, 1983, also held the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings to be constitutional and valid. Furthermore, on January 18, 1983, this Court signed an Order pursuant to 28 U.S.C. § 1292(b) stating that in

its opinion, its Order signed on January 14, 1983, involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Then, on January 20, 1983, this Court entered its "Memorandum Opinion" giving a more detailed explanation of its conclusions in its Order of January 14, 1983.

The Court, pursuant to Local Rule (e)(3) of the Local Rules of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings, now having reviewed the "Order on Jurisdiction" entered by the Bankruptcy Judge, hereby affirms that "Order on Jurisdiction" and concludes that the same question of law is involved in that "Order on Jurisdiction" which was involved in this Court's Order of January 14, 1983. Thus, this Court is of the opinion that the "Order on Jurisdiction" involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation, and the Court hereby CERTIFIES this Order for Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b).

Signed this 21st day of January, 1983.

/s/ Eldon B. Mahon
UNITED STATES DISTRICT JUDGE

APPENDIX E.

Order on Jurisdiction.

In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

In re Braniff Airways, Incorporated, et al., Debtors.

In Proceedings for a Reorganization Under Chapter 11.

Case No. 482-00369.

This Court has received objections to its jurisdiction to consider some or all matters in the above-captioned proceedings including specifically the Debtor's request for an order (i) approving an Agreement dated December 22, 1982 between Debtor and Pacific Southwest Airlines; (ii) approving a proposed settlement and compromise of all claims by and among Debtor, the Committee of Unsecured Creditors and Unofficial Committee of Secured Creditors; (iii) authorizing Debtor to implement its obligations under the PSA Agreement; and (iv) making certain other findings and orders, all as specified in the Notice of Hearing Dated December 30, 1982. Each of the objections is to the effect that this Court lacks jurisdiction as a result of the Supreme Court's decision in *Northern Pipeline*.

Such objections have been filed by American Airlines; Continental Airlines; Delta Airlines; Northwest Airlines; Pan American World Airways; Muse Air; Southwest Airlines; United Airlines; Air Line Pilots Association; Association of Flight Attendants; International Association of Machinests; International Brotherhood of Teamsters, Airline Division; Dallas/Fort Worth Regional Airport Board; Aviall; International Air Transport Association; Committee of Unsecured Creditors; Secured Bondholders Committee; Chemical Bank as Indenture Trustee for 10% Notes; and U. S. Trust as Indenture Trustee for 9⅛% Debentures and The Bank of New York as Indenture Trustee for 5¾% Debentures.

This Court has considered the briefs and arguments of counsel for all listed parties, and has concluded that those arguments are foreclosed by the decision rendered by the United States District Court for the Northern District of Texas on January 14, 1983. That decision, which this Court concludes is the law of the case in these proceedings upheld the constitutionality of this Court's jurisdiction.

It is therefore ORDERED that the objections to jurisdiction based upon *Northern Pipeline* are hereby overruled.

/s/ John Flower
U. S. Bankruptcy Judge

Fort Worth, Texas
January 15, 1983

APPENDIX F.

Text of Constitutional Provisions, Statutes and Rules.

U.S. Const., art. III, § 1 provides:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598:

Section 238(a) provides: Section 1334 of title 28 of the United States Code is amended to read as follows:

> "§ 1334. Bankruptcy appeals
>
> "(a) The district courts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.
>
> "(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.
>
> "(c) A district court may not refer an appeal under that section to a magistrate or to a special master.".

(b) The table of sections of chapter 85 of title 28 of the United States Code is amended by striking out the item relating to section 1334 and inserting in lieu thereof the following:

> "1334. Bankruptcy appeals.".

Section 241(a) provides in relevant part:

Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:

§ 1471. *Jurisdiction*

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

Section 401 provides in relevant part:

Sec. 401(a). The Bankruptcy Act is repealed.

Section 404(a) provides in relevant part:

COURTS DURING TRANSITION

Sec. 404(a) The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

Section 405 provides:

(a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except —

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt —

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy court established under section 201 of this Act.

(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be—

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237,

238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

(d) The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.

11 U.S.C. § 105, provides in relevant part:

The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

28 U.S.C. § 332(d) provides:

(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1334 [referred to as old 28 U.S.C. § 1334], provides:

> The district courts shall have original jurisdiction exclusive of courts of the States, of all matters and proceedings in bankruptcy.

28 U.S.C. § 2071 provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. As amended May 24, 1949, c. 139, § 102, 63 Stat. 104.

Rule 17 of the Rules of the Supreme Court provides:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by

a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Rule 53 of the Federal Rules of Civil Procedure provides in relevant part:

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(e)(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or

may receive further evidence or may recommit it with instructions.

Rule 83 of Federal Rules of Civil Procedure provides in relevant part:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 927 of the Rules of Bankruptcy Procedure provides:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedure under the Act not inconsistent with these rules. Copies of rules and amendments so made shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of such rules available to members of the public who may request them. In all cases not provided for by rule, the district court may regulate its practice in any manner not inconsistent with these rules.

The Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings provides:

> In the United States District Court for the Northern District of Texas.
>
> (a) Emergency Resolution
>
> The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate re-

medial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The court of bankruptcy constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own

motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system of assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3)(A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; courterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bank-

ruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2)(A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (e)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding

prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. § 2075 and limited by SEC [sic.] 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

This rule supersedes the previous rule of this court entered and filed on the 4th day of October, 1982, which prior rule is here canceled.

This order has been executed by the Chief Judge of the United States District Court for the Northern District of Texas after consent to the entry of the order was obtained from each district judge and a majority of the bankruptcy judges of the district.

ENTERED this the 21st day of December, 1982.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

82-1623

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF	)	IN BANKRUPTCY
	)	
PAUL C. WILDMAN, et al.,	)	NO. 81 B 5869
	)	
Debtor.	)	

MEMORANDUM OPINION

There presently are pending before this Court fourteen motions to dismiss bankruptcy cases and bankruptcy proceedings on the ground that this Court does not have jurisdiction to act, under the principles enunciated in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. _____, 102 Sup. Ct. 2858 (1982), (hereinafter referred to as the Northern Pipeline case.)[1] All of the motions concern the validity of a rule adopted December 20, 1982 by the District Court of the Northern District of Illinois,[2] pursuant to a directive of the Circuit Council for the Seventh Circuit, issued December 23, 1982, following a memorandum of the Director of the Administrative Office of the United States, dated December 3, 1982, directed to federal judges and clerks and enclosing a model rule and sample order. The variations between the rule adopted in this district, the rules adopted in other districts, and the two model rules distributed by the Administrative Office, respectively September 27, 1982 and December 3, 1982, are not of sufficient importance to the issues to be decided here to justify com-

parison. Similarly, in decisions of case precedents involving the rule no attempt will be made to distinguish the differences, which are peripheral and do not affect the central core issues.

The captioned proceeding arose in a voluntary Chapter 11 reorganization of an individual who is a general partner in a number of limited partnerships, many of which also have filed voluntary Chapter 11 cases. There is a common trustee at the present time for all of the cases, in spite of a theoretical conflict of interest, because the books and records of all of the debtors are in such a state of disarray that it would have been impossible to determine the debtor-creditor relationships among them until meaningful records had been reconstructed. (It would have been possible to have had 15 trustees from the outset, provided that they all had retained the same accountant and had been willing to have permitted one of their number to be the lead trustee in establishing priorities respecting the order in which administration problems would have been addressed, but the expenses of administration would have been astronomical). The principal asset of each limited partnership is an apartment building located on the Near North Side in Chicago. The principal asset of each general partnership is the general partners' interest in the limited partnerships.

The motion to dismiss on jurisdictional grounds was filed by a committee of the limited partners, which also has objected to

the sale of the apartment building, to the payment of accountant's fees, to the payment of attorneys' fees, and to the payment of real estate broker's commissions. Some interim attorneys' fees and accountant's fees have been authorized by the Court to the extent of 50% of the amount requested, with the balance to be considered near the termination of the case. Those motions are being held in abeyance until after the jurisdictional motion to dismiss has been determined.

BACKGROUND

Probably the greatest problem presented to the Anglo-American bankruptcy practice throughout its 440 year history has been the absence of a broad and clearly defined jurisdiction. At the outset the bankruptcy commissioners had jurisdiction only over assets which they could bring into their possession. This broadened to the point where assets in the actual or constructive possession of the bankrupt were deemed to be in custodia legis. As bankruptcy courts, the district courts had only a summary jurisdiction. Innumerable appellate decisions turn on the issue of summary jurisdiction and plenary jurisdiction,[3] decisions which had to become final as a preliminary to the problem of administering the bankrupt estate. Delays of several years might take place with the attendant large attorneys' fees over the question of whether a corporate reorganization properly was before a referee in a Chapter XI case or before a district court

in a Chapter X case. Frequently the delay in reaching that conclusion caused all hopes for rehabilitation to vanish, and the only question which remained was what court would oversee the liquidation. Much of the ten years preceding the final passage of the Bankruptcy Reform Act of 1978[4] was devoted to hearings on the issue of court structure and jurisdiction.

During the middle 1970's as bankruptcy reform was being considered in Congress, one of the principal improvements sought was to eliminate the delays and expense which were the inevitable consequence of a divided jurisdiction over both bankruptcy cases and proceedings arising in or related to bankruptcy cases. There was a considerable concern that giving broad authority to Article I judges might create a constitutional problem, and H.R. 8200, which is the skeleton of both the Bankruptcy Code and the bankruptcy amendments to the Judicial Code, provided for an Article III bankruptcy court. The Senate Bill (S. 2266) provided for an Article I bankruptcy court, but in the Conference Committee at the end of the 95th Congress both houses agreed to an Article III court. The House approved the conference report, and it was on the consent calendar of the Senate when the Chief Justice called several Senators on the telephone, including Senator Strom Thurmond of South Carolina. That conversation has not been published, but as a consequence of it, Senator Thurmond placed a hold on the bill which was not released until §1471 was

modified to provide for a two-tiered court structure in which the district court had original and exclusive jurisdiction over all bankruptcy cases (§1471(a)) and also original but not exclusive jurisdiction over all proceedings arising in or related to bankruptcy cases (§1471(b)).[5] The jurisdiction granted to the district courts was to be exercised by the bankruptcy courts (§1471(c)). It was the exercise of Article III power by Article I Courts which the Supreme Court found unconstitutional in Northern Pipeline.

The Supreme Court granted a three month stay of judgment (June 28, 1982 - October 4, 1982) to permit the Congress to correct the jurisdictional problem either by increasing the stature of the bankruptcy court to an Article III plane or by reducing the level of authority to that appropriate to an Article I court. When Congressional action had not been completed by October 4, the Court granted another three month stay which expired December 24, 1982, without a law having been enacted.

An interim rule was devised by the Judicial Conference as a contingency measure to provide bankruptcy continuity in the event that Congress did not act by December 24. The rule was adopted by the circuit councils of all of the circuits and by all of the district courts within three or four days of December 24. The validity of that rule is the subject of this opinion.

BANKRUPTCY COURT JURISDICTION

The essential issue raised by the respective motions to dismiss filed in the cases and proceedings under consideration is whether this Court has jurisdiction to hear the matter. Surface refinements cause the precise question of each individual motion to dismiss to differ somewhat as to whether it is:

(a) jurisdiction to hear a bankruptcy case,

(b) jurisdiction to hear a proceeding arising from a bankruptcy case, or

(c) jurisdiction to hear a proceeding relating to a bankruptcy case.

Because the underlying core issue is the same under all circumstances, that core issue will be answered first. It happens in the view of the law adopted by this Court, as will be explained more fully later, that the result is the same under all circumstances, although that need not have been the result if the Court had taken a narrower view of the infirmities of the interim rule.

Due to loose usage of terminology for the last century, the question of bankruptcy court jurisdiction before the enactment of the Bankruptcy Code has been obscured in the decisions and in the treatises and law review articles. So that there can be no doubt as to the meaning of this opinion, a short review of bankruptcy court jurisdiction in the past will precede a discussion of current controlling factors.

In England, there was no statutory court legislation affecting bankruptcy and insolvency jurisdiction until after American independence. The Court for Relief of Insolvent Debtors was established in 1820.[6] Originally insolvency petitions had been heard by Royal Commissions without clear lines of authority. After 1649 statutory guidelines were established for administration by commissioners or in Chancery. The Court in Bankruptcy was established in 1831.[7] Originally bankruptcy commissioners had gone to whatever court they felt might provide them with the most prompt relief. After 1600 most bankruptcy cases and proceedings were heard in Chancery.

In the United States, under every bankruptcy act, the authority of the adjudicative body always has been delineated in the enabling statute. As in England, the nature of the assets determined the nature of the jurisdiction. Until the nineteenth century wealth ordinarly was held in the form of gold, silver, land, goods, or commodities, all tangibles. A bankruptcy action was an involuntary proceeding (until 1841) in which a bankruptcy commissioner on behalf of creditors who had filed claims would collect and liquidate the tangible assets of the debtor and distribute the net proceeds among the claimants. Under the Bankruptcy Act of 1800,[8] for example, the district court or

commissioners were given jurisdiction over the property in possession of the debtor, which was deemed to be in custodia legis. This was an in rem jurisdiction.

The exclusive jurisdiction which bankruptcy courts traditionally have had over property within their control has a double heritage. As a matter of common law it has been established for centuries that the first court to obtain possession of a res maintains exclusive possession of it thereafter,[9] even though in in personam proceedings two courts of concurrent jurisdiction may continue to hear the case until a judgment is obtained in one. During the early days in English bankruptcy there frequently was a race to the courthouse between the bankruptcy commissioners and creditors who chose not to file claims, each hoping to be the first to obtain possession of the res. Usually the commissioners proceeded in Chancery, and the competing creditors would bring a detinue action in the Court of Common Pleas.

In the United States the situation has been different because the bankruptcy power is one of the express powers of Congress,[10] and under the supremacy clause the federal power supersedes that of the states.[11] Thus, as a result of the Constitution the bankruptcy courts have had exclusive jurisdiction over every res whether or not the bankruptcy court was the first to obtain possession of the res.[12] The Bankruptcy Code

gave to the bankruptcy court full jurisdiction in rem and also full jurisdiction in personam with respect to bankruptcy cases and to proceedings arising from or related to bankruptcy cases.

Going back into history, trials which have followed common law procedure have been called plenary process and trials which have not have been called summary process. Frequently the difference between the two was the absence of jury trials in summary process. A trial in Chancery was not subject to a jury determination and thus was summary process. A hearing before a tribunal which was not a court similarly was summary process.

A slightly different and more common usage of "summary process" was as a generic term to describe motions, petitions, applications, and objections as contrasted with the more formal complaint and answer process. The simpler process generally was used by commissioners, registers, or referees (depending upon which of the bankruptcy acts was in force), and was called summary process. The formal procedure was used in the district courts, and was called plenary process.

Just as there were two slightly different meanings of summary process current at the same time, so also there were two variations of "summary jurisdiction." The first placed the emphasis upon the limited nature of the jurisdiction of the court of bankruptcy,[13] that essentially it was an in rem jurisdiction with in personam authority granted only in actions by trustees

and receivers under §§60b, 67a(4) and 70e(3). The second placed the emphasis on the federal nature of the jurisdiction of the courts of bankruptcy, that they were limited to bankruptcy law and other federal questions, and were excluded from state law questions. In footnote 31[14] of the plurality opinion in Northern Pipeline it is noted that the question of whether a state law issue could be heard by bankruptcy referees with the consent of the parties (Bankruptcy Act §2(7)) never had been addressed as a constitutional problem.[15]

That section (Bankruptcy Act §2(7) has been misunderstood and referred to as "consent jurisdiction" or "ambush jurisdiction", but it is not proper to suggest that it creates subject matter jurisdiction by consent. The statute authorizes a limited in personam jurisdiction, just as it did under sections 60, 67 and 70. Like a Californian who committed a tort in Illinois and cannot be subjected to an in personam judgment in Illinois without service in this state, or actual consent, or implied consent from filing a general appearance, the defendant under §2(7) must have consented, or filed a general appearance, or filed a claim which was deemed to be a consent. In both instances the court had a subject matter jurisdiction by statute.

Interim rule section D(3)(b) indicates a lack of understanding of subject matter jurisdiction and permits it to be established if "the parties to the proceeding consent to entry of

the judgment or order by the bankruptcy judge." There is no statutory foundation upon which the subject matter jurisdiction rests; it rests merely upon an order of court. The Bankruptcy Act "consent jurisdiction" cases are no precedent for it.

The most confusing aspect of the summary jurisdiction usage is that the term frequently was used to describe the jurisdiction of the bankruptcy court. The correct usage was to describe the bankruptcy authority of the district courts as courts of bankruptcy. The courts of bankruptcy (i.e., district courts) had a summary jurisdiction, that is, an in rem jurisdiction. Because of the fact that the district courts when not acting as courts of bankruptcy also had a plenary jurisdiction, it became quite common to say that district courts had plenary jurisdiction and that bankruptcy courts had summary jurisdiction. While operating in a bankruptcy context, each of them had only a summary jurisdiction. The district court had a plenary jurisdiction with respect to collection proceedings which might be brought as an action against a foreign state (§1330), or a federal question (§1331), or diversity (§1332), or admiralty (§1333), or commerce (§1337) or patents (§1338), and so forth. As a court of bankruptcy, it had a summary jurisdiction, originally an in rem jurisdiction limited to property in custodia legis and later expanded to include limited in personam proceedings brought by trustees or receivers to set aside preferences, avoid liens, and

act as a bona fide purchaser, or to collect upon state law actions with the deemed consent of the adversary party. The summary jurisdiction of the bankruptcy court was the same as the summary jurisdiction of the district court.

From the standpoint of jurisdiction, the courts of bankruptcy are not now, and in the past have not been, different from other federal courts with respect to their source of jurisdiction nor with respect to their limited jurisdiction.

The Judicial Code picks up from the Constitution and

(a) provides for original and exclusive jurisdiction of the Supreme Court in §1251 and appellate jurisdiction in §§1252-1254, and 1257 and 1258; (28 U.S.C. §§1251-54, 57 and 58);

(b) provides for appellate jurisdiction of the courts of appeals in §§1291-1295; (28 U.S.C. §§1291-95); and

(c) provides for original jurisdiction of the district courts in §§1330-1364. (28 U.S.C. §§1330-1364).

Until the enactment of Title II of the Reform Act, the Judicial Code did not contain any reference to bankruptcy jurisdiction, other than §1334, to be discussed below.[16] Under the four bankruptcy acts which preceded the Bankruptcy Reform Act, court jurisdiction was provided in the bankruptcy act itself:

(a) Act of 1800 - district court and commissioner appointed by the district court;[17]

(b) Act of 1841 - district court and circuit court;[18]

(c) Act of 1867 - district court, circuit court,[19] and register; state court could collect debts up to $500;

(d) Act of 1898 - district court and referee.[20]

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Seventh Amendment expressly applied only to actions at common law, and so it never was applicable to any cases or proceedings under any of the bankruptcy acts, which were conducted under summary process.

The law is so clear that the creation of court jurisdiction is statutory that it is somewhat surprising that the respective circuit councils and district courts swallowed the bait offered by the Administrative Office and adopted the interim rule.

> "Federal courts are courts of limited jurisdiction... Jurisdiction of the lower federal courts is further limited to those subjects encompased within a statutory grant of jurisdiction. Again, this reflects the constitutional source of power: apart from [the Supreme] Court, that power exists "in such inferior Courts as the congress may from time to time ordain and establish. Art. III, §1.
>
> Subject matter jurisdiction, then, is an Article III as well as a statutory requirement: it functions as a restriction on federal power and contributes to the characterization of the federal sovereign." Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S. Ct. 2099, 2104 (1982); M. C. & L. M. Railway Co. v. Swan, 111 U.S. 379 (1883).

Subject matter jurisdiction is so important, moreover, that absence of it must be raised at any time, sua sponte, by a court at any level. Not only is the absence of subject matter jurisdiction critical, but so also is the failure to state affirmatively the existence of subject matter jurisdiction. Preston v. Purtell, 410 F.2d 234, 236 (7 Cir. 1969); Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449 (7 Cir. 1982); Daniel Hale Williams Mem. v. City of Chicago, 407 F. Supp. 342 (N.D. Ill. 1976); Gyromat Corp. v. N. G. Fischer & Co., 167 USPQ 326 (N.D. Ill. 1970).

Another loose usage of the word, jurisdiction, in bankruptcy circles derived from Lockwood v. Exchange Bank, 190 U.S. 293 (1903) in which the Supreme Court held that property which had been declared exempt in an originating petition did not come within an estate and thus was not within the powers of the bankruptcy court. There is a myriad of decisions and treatise statements which have misunderstood Lockwood and have declared that under the Bankruptcy Act bankruptcy courts did not have jurisdiction over exempt property, which is poppycock. Once the bankruptcy court declared an item of property exempt, the court lost power over that property, but not jurisdiction, and the writers have failed to distinguish between power and jurisdiction. A simple method of proof is to assume that on Monday the bankruptcy court declares a bed to be exempt property and on Tuesday vacates the exemption. If the court

had lost jurisdiction, it could not have vacated the exemption and returned the property to the estate because no court can create its own jurisdiction. The declaration of exemption merely terminated the power of the bankruptcy court to deal with the property and did not affect its jurisdiction. In Lockwood, the exempt property never had been a part of the estate.

COURTS OF BANKRUPTCY

"Courts of bankruptcy" was the caption of the first part of the Bankruptcy Act of 1867, which provided in part,

> "§1... That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy ..."

It is worthwhile to devote some space to "courts of bankruptcy" because of the continuous and deliberate misuse of the term by the Administrative Office, the Judicial Conference, and the Department of Justice.[21]

As initially passed, the Bankruptcy Act of 1898 provided, in part,

> "§1 (8) 'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and the Indian Territory, and of Alaska ..."
>
> "§2. That the courts of bankruptcy as hereinafter defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the district courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made courts of bankrutpcy ..."

The more widely known version of these two sections results from amendments of 1926, and as amended, reads,

"§1 (10) 'Courts of bankruptcy' shall include the United States district courts and the district courts of the Territories and possessions to which this Act is or may hereafter be applicable;"

"§2a The Courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy ..."

Act of May 27, 1926, 44 Stat. 662.

There has been no variation in the meaning of "courts of bankruptcy" for more than one century. Broadly defined, it means district courts, and it always has meant district courts. That meaning has been widely recognized as a term of art. Stated in the reverse, "courts of bankruptcy" never had meant referees, and never has meant bankruptcy courts. This meaning is known to bankruptcy judges, scholars and practitioners. It probably was not known to circuit councils and to district judges in the fall of 1982, which permitted them to appear to have been abused by the Judicial Conference and the Administrative Office. The meaning of "courts of bankruptcy" and "bankruptcy court" was known to the Administrative Office in the fall of 1982 when the second directive was distributed respecting an interim rule.[22] Mr. Foley's letter of December 3, 1982, states in part,

> "The attached model rule is intended to be an interim measure, by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The authority for that delegation is found in section 105 of the 1978 act, which gives courts of bankruptcy [sic] the power to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.'" (underscoring supplied).

Section 105 will be discussed later in greater detail. Suffice it to say at this point that it reads, in part,

> "§105(a) The bankruptcy court may ..." (underscoring supplied).

Section 105 does not mention "courts of bankruptcy", it does not refer to "courts of bankruptcy', it does not refer to district courts.

The Administrative Office was faced with the logistical problem of transferring the jurisdiction which it said lay with the district court from the district court to the bankruptcy court. To do so it had to invent a means of delegation because none existed upon which it could rely. The ploy selected was not readily apparent to someone not familiar with the Bankruptcy Code, such as a district court judge or circuit court judge, who might not have recognized that §105 said "the bankruptcy court" and not "courts of bankruptcy", or if he had recognized the substitution might not have appreciated the significance of it.

It is not necessary to analyze Northern Pipeline in detail in order to establish the invalidity of the interim rule, but a short analysis will follow to demonstrate additional reasons that the rule is invalid. Assuming, arguendo, that the district court has a bankruptcy jurisdiction from whatever source, how does that jurisdiction become transmitted to a bankruptcy court? Mr. Foley's letter of December 3, 1982, cited two principle avenues of transmission.

§105 of the Bankruptcy Code

In the immediately preceding paragraphs it was demonstrated that the Administrative Office had misquoted §105 and had given to the district court a power which the Bankruptcy Code had given to the bankruptcy court. This and other misquotations by the Administrative Office were an immediate warning to anybody familiar with bankruptcy law. If the citations had been valid, it would not have been necessary for the Administrative Office to misquote them. The fact of the misquotations was circumstantial evidence of invalidity. §105 of the Bankruptcy Code, provides, in part, as follows:

> "(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

The legislative history indicates that the purpose of §105 was to continue and to spell out expressly the general authority of all courts to enforce their orders, as provided in the All Writs statute.

> "§1651 (a). The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 U.S.C. §1651(a)).

§105 also was designed to continue for a bankruptcy court the powers which had been expressly authorized to district courts (courts of bankruptcy) under §2a(15)of the Bankruptcy Act.

> "a. The courts of the United States hereinbefore defined as courts of bankruptcy ... are hereby invested ... with such jurisdiction ... as will enable them to ...
>
> (15) Make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: ..."

§105 so clearly relates to process and to methods of enforcing orders and judgments that it tests the credulity of anybody who has had more than two years of law school to believe that the Judicial Conference, the Administrative Office, or the Department of Justice honestly considered that this section could be the basis of a delegation of jurisdiction, even if the section had related to district courts, as the Administrative Office said that it did. It is equally

absurd to suggest that the bankruptcy court, to which the section was directed, would have an ability to create its own jurisdiction.

Bankruptcy Rule 927

The second citation which the Administrative Office gives as authority for the validity of the interim rule is Bankruptcy Rule 927, which provides, in part, as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedure under the Act not inconsistent with these rules." (underscoring supplied). (Bankr. R. 927)

The underscored portion of Rule 927 was omitted by the Administrative Office, just as that office omitted "not inconsistent with these rules" when previously it had cited Rule 83 of the Federal Rules of Civil Procedure as authority:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules.... In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." (underscoring supplied). (Fed. R. Civ. P. 83)

The phrase "not inconsistent with these rules" is a key to the rule making powers of courts because the delegation of rule making power is partial only, procedural and not substantive. Congress retained unto itself all aspects of the federal court authority other than the mechanical operations of the courtroom and the necessary functions preceding and following trial.[23]

§2071 - Rule-making power generally

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." (28 U.S.C. §2071)

§2072 - Rules of Civil Procedure

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions..." (28 U.S.C. §2072).

§2075 - Bankruptcy Rules

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11..." (28 U.S.C. §2075).

§331 - Judicial Conference of the United States

"[The Conference] shall submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise [disciplinary] authority ... as the Conference or through a standing committee... The Conference may also prescribe and modify rules for the exercise of [disciplinary] authority...

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law..." (28 U.S.C. §331).

The interim rule was developed by the Committee on the Administration of the Bankruptcy System, of which Judge Robert E. DeMascio of the District Court of Eastern Michigan is the chairman. In a slightly different form the interim rule was proposed to federal judges by the Director of the Administrative Office on September 27, 1982 (not needed because of an extension of the stay) and again on December 3, 1982. Lawyers who are familiar with the development of the rule and its legislative uses in the fall of 1982 and the winter of 1982-1983 fault the Judicial Conference in four major respects:

1. acting beyond its statutory authority,
2. lobbying in Congress,
3. misleading the circuit councils, and
4. misleading the district courts.

The task which confronted the Judicial Conference as it insinuated its way into a legislative role was to:

1. show that the district courts retained a bankruptcy jurisdiction, and
2. devise a method of transferring to the bankruptcy courts the maximum amount of that jurisdiction consistent with Northern Pipeline.

The Judicial Conference was created by Congress with specific powers described in §331 of the Judicial Code. It is composed of the chief judge of each circuit and one district judge from each circuit elected annually at the circuit conference, and is presided over by the Chief Justice. It is authorized to make

suggestions and recommendations respecting court management and may establish rules respecting the exercise of disciplinary authority.

The Judicial Conference is not authorized to lobby in Congress, as it has done extensively for the last nine months. It does not have the authority to establish jurisdiction for inferior federal courts, which is a Congressional prerogative, nor to establish nor promulgate rules not associated with discipline. Other than discipline, its rule making responsibility is in making suggestions to the Supreme Court.

During the fall and early winter of 1982 the Judicial Conference had frequent contacts with members of the Congress in which it advised them that the interim rule made prompt legislation unnecessary. A number of Senators, in particular, advised their constituents that they had not stressed legislation in reliance upon the assurances of the Judicial Conference that there was no need for it.

§332. Judicial Councils of Circuits

"...(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit..." (28 U.S.C. §332(d)(1).

Chapter 41 - Administrative Office of the United States

"§604(a). The Director shall be administrative officer of the courts and ... shall;

(3) Submit to the annual meeting of the Judicial Conference of the United States ... a report of the activities of the Administrative Office and the state of the business of the courts, together with the statistical data submitted to the chief judge of the circuits...

(13) Lay before Congress, annually, statistical tables that will accurately reflect the business transacted by the several bankruptcy courts, and all other pertinent data relating to such courts;

(e) The Director may promulgate appropriate rules and regulations approved by the conference and not inconsistent with any provision of law, to assist him in the performance of the duties conferred upon him [respecting magistrates]..." (28 U.S.C. §604(a).

The Administrative Office of the United States is provided for primarily in §§601-611 of the Judicial Code. Essentially it is under the supervision of the Judicial Conference, but the Director and Deputy Director are appointed by the Supreme Court. Primarily the Administrative Office is a management and reporting agency. It does not have the authority to make or disseminate rules respecting the jurisdiction of federal courts, it does not have authority to encourage federal judges to lobby,[24] it does not have the authority to lobby itself.

In its letter of December 3, 1982 to federal judges and clerks the Administrative Office misled the respective judicial circuit councils because the Administrative Office knew that:

1. Rule 927 of the Bankruptcy Rules applies to practice and procedure and not juridiction, and

2. Rule 927 does not permit local rules which are inconsistent with Bankruptcy Rules; the interim rule is inconsistent, and

3. Its directive of December 3, 1982, misquoted Rule 927, and

4. Section 105 of the Bankruptcy Code relates to bankruptcy courts and not district courts,

5. Its directive of December 3, 1982 misquoted Section 105, and

6. Section 105 relates to orders, process and judgment and not to jurisdiction.[25]

There is no authority for the Judicial Conference nor the Administrative Office to lobby Congress, to expend federal funds in a lobbying effort, nor to encourage federal judges to engage in a lobbying effort.

In short, there is no rule-making authority at any level which permits the respective activities of the Judicial Conference, the Administrative Office, the circuit councils, or the district courts to advance or to adopt the interim rule. All of them are acting unlawfully. Each of them is exceeding its authority because their assigned responsibilities are judicial or administrative; in no event are they legislative or political.[26]

It is not necessary to examine each of the statutory sections in detail. All of them deal with the same basic subject in the same general way. The courts and their administrative officials may make rules or regulations respecting the business operations of the courts and the practice and procedures to be observed in the courts. There is nothing which grants to any court or to any official office or officer any authority to make or recommend

rules or procedures other than those described. There is nothing in any of the statutes which suggests in the slightest way that any of those bodies may increase, reduce or modify the jurisdiction of bankruptcy courts or of any other courts. That would be trespassing upon terrain reserved to the Constitution or to the Congress. There is nothing in any of the statutes which suggests in the slightest way that any of these bodies may increase, reduce or modify the scope of the Bankruptcy Rules or the Federal Rules of Civil Procedure, both of which have the force of a statute because of the manner in which they were authorized and submitted to the Congress. In fact, both the Bankruptcy Rules (Rule 927) and the Rules of Civil Procedure (Rule 83) state expressly that permissible procedural rules and orders shall be "not inconsistent with these rules."

Miner v. Atlass, 363 U.S. 641 (1960) is a particularly appropriate case to consider under the present circumstances; it related to a local discovery rule in admiralty cases. Rule 44 of the General Admiralty Rules provided:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules. 363 U.S. 647 (Emphasis in original).

The Court held that the taking of discovery depositions permitted by the local rule was inconsistent with existing admiralty rules and thus invalid. Many examples of inconsistencies between the

interim rule and the Bankruptcy Rules could be catalogued, but the absence of an ability to conduct jury trials under the interim rule is enough.

Rule 82 of the Rules of Civil Procedure provides, in part,

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." (Fed R. Civ. P. 82)

Rule 928 of the Bankruptcy provides,

> "These rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter." (Bankr. R. 928)

A listing of the approved scope of rule-making statutory sections suggests that the creation by the Judicial Conference of the jurisdiction delegating rule is a sleight-of-hand means of postponing permanent legislation.

Judicial Code:

§2071 - "rules for the conduct of their business ... rules of practice and procedure"

§2072 - "forms of process, writs, pleadings and motions and the practice and procedure"

§331 - "management procedures and the expeditious conduct of court business"
"study of the operation and effect of general rules of practice and procedure"
"rules ... to promote simplicity in procedure"

Federal Rules of Civil Procedure:

Rule 83 - "rules governing practice"
"regulate their practice"

Bankruptcy Rules:

Rule 927 - "rules governing practice and procedure"

It is difficult for this Court to take seriously an argument that Rule 927 permits the adoption of an interim rule creating jurisdiction for a bankruptcy court when it is so clear that Rule 927 limits rule-making power to those "governing practice and procedure". Process, practice, procedure, pleadings, motions are all precise terms describing the mechanical aspects of a trial. None of them relates to jurisdiction. All of the rule-making statutes and rules are so limited because the drafters of the statutes and rules recognized that the granting of jurisdiction is either by constitution or by statute and cannot be done by a court nor by an administrative office of a court.

The same kind of unwarranted distortion by the Judicial Conference is apparent respecting enforcement orders.

Judicial Code:

§1651 - "all writs, necessary or appropriate in aid of their respective jurisdictions"

Bankruptcy Act:

§2a(15) "make such orders, issue such process, and enter such judgments ... as may be necessary"

Bankruptcy Code:

§105 "issue any order, process or judgment that is necessary"

It is inconceivable that anybody could contend conscientiously that statutes of this nature permit courts to delegate their jurisdiction or create jurisdiction for themselves. It was difficult for many persons to take the interim rule seriously when

it first appeared because it is so contrary to existing court structures and operations. Jurisprudentially it is impossible for either Rule 927 or Section 105 to perform the task assigned to it by the Judicial Conference of creating jurisdiction for bankruptcy courts.

§§404 and 405 of Bankruptcy Reform Act

The pattern which the Congress established under the Reform Act was to:

1. place all bankruptcy authority within a single court,
2. have the substantive changes in the law become effective October 1, 1979,
3. have most of the procedural changes take effect on October 1, 1979, reserving until April 1, 1984, all fundamental changes in court structure, and
4. have any cases filed under the Bankruptcy Act and still pending be administered as if the act had not been repealed.

Title IV of the Reform Act was entitled "transition" and was intended to accomplish a smooth changeover from the Act to the Code during the period from October 1, 1979 until April 1, 1984.

§404(a) of the Reform Act continues in effect through March 31, 1984 the court structure which existed on September 30, 1979, just as §403 continues in effect as to all cases pending on September 30, 1979, the substantive law which applied on that date, even though §401(a) repealed the Bankruptcy Act proper. §404(a) provides:

> "§404(a). The courts of bankruptcy as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such a court of bankruptcy under the Bankruptcy Act." (underscoring supplied).

Courts of bankruptcy and summary jurisdiction were discussed above at pages 5-16, where it was pointed out that the basic bankruptcy jurisdiction of the district courts resulted from their being courts of bankruptcy. Otherwise district courts would not have been able to hear bankruptcy cases at all. There was no feasible method of continuing the administration of Bankruptcy Act cases in the same manner as before unless the substantive features of the old law were implemented by the procedural provisions of the old law.

It will be noted, as shown by the underscoring above, §404(a) speaks of the courts of bankruptcy as being continued. In its interim rule the Judicial Conference attempted to create the impression that the Congress had purposely established jurisdiction for existing bankruptcy courts, as follows:

> "(b) The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court..." (emphasis supplied).

§404 did not constitute any court. It did not create anything; it merely continued the district courts as courts of bankruptcy; they had been constituted courts of bankruptcy in 1867 and again in 1898. To an ordinary observer it seems unconscionable that the Judicial Conference should adopt such shallow methods to achieve its ends.

§405 provides in part:

> "(a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except ...
>
> (b) During the transition period, the amendments made by sections 241 ... of this act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy courts established under section 201 of this act." (underscoring supplied).

Section 405(a) read alone, appears in its first sentence to provide bankruptcy authority to the United States bankrupty judges because it causes all cases to be referred to them. The second sentence, however, provides that they exercise "the jurisdiction and powers conferred" by §405(b) on the district courts. Subsection 405(b) states that §241 shall apply, and the latter is the section which was held unconstitutional in the Northern Pipeline case. Consequently, §405 does not advance the cause of the

interim rule at all. §241 controls jurisdiction after April 1, 1984 standing on its own. §241 controls jurisdiction before April 1, 1984 because of a specification in §405(b).

Fifth Amendment, §455 and Canon 3

§455 of the Judicial Code provides in part as follows:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."(28 U.S.C. §455).

This section causes to be disqualified in any proceeding contesting the validity of the interim rule any member of a circuit council which adopted the interim rule, as well as any district judge who voted for the rule. Normal behaviour will cause them to wish to vindicate their previous decisions in adopting the rule. Canon 3 of the Code of Judicial Conduct is similar. It generally is believed that a substantial number of the district judges and a lesser percentage of the circuit judges have engaged in direct lobbying with members of the Congress and in doing so have advised them that there is no emergency requiring the passage of immediate legislation because the interim rule of the Judicial Conference has everything under control. If any of those judges who assured a Congressman in December should now hold the rule invalid, he would lose all credibility with that Congressman forever. It would be contrary to human nature to expect such a judge to decide against the validity of the rule.

The bias of the district and circuit judges is apparent. They will uphold the rule; the opponent of the rule does not have an opportunity to be heard in an impartial forum. With a single exception every district and circuit judge who has passed on the rule has upheld it, as was predicted. Not one of them has disqualified himself. Few of them even have addressed the legal questions raised by the rule. An example in point is In re Northland Point Partners, [27] decided by Judge Robert E. DeMascio of the Eastern District of Michigan, on January 7, 1983, a mere 10 days after the rule became operative. Judge DeMascio is Chairman of the Judicial Conference Committee on the Administration of the Bankruptcy System and submitted the rule to the Conference on September 23, 1982. Predictably he upheld the rule, relying upon the same misquoted authority as had been advanced by the Director of the Administrative Office. Immediately Judge Feikens, chief judge of the same district, mailed a copy of the order to the Chief Judges of all of the other districts, an unprecedented action, but a clear demonstration of the bias of the district judges.[28]

It has been suggested that the bias of the district and circuit judges resulting from their desire of self-vindication prevents an appeal from a bankruptcy court to an impartial tribunal, thereby denying due process to an unsuccessful litigant at the bankruptcy court level. This has the effect of making

non-appealable the final order of a special court of limited jurisdiction. Educators express the view that it is both unethical and unlawful for most circuit judges and district judges to hear an appeal. Many of them feel that it was improper for the Chief Justice to sit on the Northern Pipeline case, because, in substance, it was his amendment which was under scrutiny.

To date there is no record that any judge has made the disclosure permitted by §455(e),

> "Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." (28 U.S.C. §455).

It would appear that the minimum disclosure requirement would be:

1. membership in the Federal Judges Association;
2. copies of all correspondence and memoranda with the Judicial Conference, Administrative Office, and other federal judges, on the subject of the interim rule or bankruptcy jurisdictional legislation;
3. copies of all correspondence and memoranda with members of the Congress and their staffs on the subject of the interim rule or bankruptcy jurisdiction legislation; and
4. summaries of all telephone conversations with any persons or organizations listed above on either subject.

Meaning of Northern Pipeline

There have not been uniform interpretations of the four opinions which constitute the Northern Pipeline decision, so that it is significant what the nine participants themselves believe is the decision of the case.

At page 2882 the Chief Justice stated,

"... the Court does not hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III of the Constitution. Rather, the Court's holding is limited to the proposition stated by Justice Rehnquist ... that a 'traditional' state commonlaw action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must ... be heard by an 'Article III court' if it is to be heard by any court or agency of the United States. This limited holding, of course, does not suggest that there is something inherently unconstitutional about the new bankruptcy courts; nor does it preclude such courts from adjudicating all but a relatively narrow category of claims; 'arising under' or 'arising in or related to cases under' the Bankruptcy Act.

It will not be necessary for Congress, in order to meet the requirements of the court's holding, to undertake a radical restructuring of the present system of bankruptcy administration. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions such as the one involved in this case, be routed to the United States district court of which the bankruptcy court is an adjunct."

For the moment no comment will be made on the separate dissenting opinion of the Chief Justice, other than to state that under the definition of inappropriate state law causes of action suggested by Justice Rehnquist, very few reorganizations or major liquidations could be completed without ancillary proceedings in the district courts or state courts. The Chief Justice's summary of the plurality opinion and the concurring opinion is:

"a 'traditional' state commonlaw action ... must ... be heard by an Article III Court..."

The dissenting opinion written by Justice White states, in part, at pages 2883-4,

> "There are, I believe, two separate grounds for today's decision. First non-Article III judges, regardless of whether they are labelled 'adjuncts' to Article III courts or "Article I judges", may consider only controversies arising out of federal law. Because the immediate controversy in this case - Northern Pipeline's claim against Marathon - arises out of state law, it may only be adjudicated, within the federal system, by an Article III court.
>
> "... Even if the Court is correct that such a state law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. [Footnote 3. The plurality attempts to justify its sweeping invalidation of §241(a), because of its inclusion of state-law claims, by suggesting that this statutory provision is non-severable. Ante, at n. 40. The concurring Justices specifically adopt this argument as the reason for their decision to join the judgment of the Court].
>
> At page 2888, "Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can account for the majority's inexplicably heavy hand in this case only by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult problem of the nature and role of Article I Courts."

The concurring opinion of Justice Rehnquist and O'Connor states, in part, at pages 2881-2,

> "From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. ... the claims of Northern arise entirely under state law...

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objections to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under §241(a), see ante, at 2880, n. 40, I concur in the judgment."

The plurality opinion written by Justice Brennan, states in part, at page 2880,

"Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the act. [Footnote 40. It is clear that at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title II in a single non-art. III court, and has done so pursuant to a single statutory grant. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicating structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid delay and expense of jurisdictional disputes... We think that it is for Congress to determine the proper manner of restraining the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose]."

The best way of determining what Northern Pipeline decided is to look at what the Justices say that it decided. The plurality of four said that all of §241(a) is unconstitutional and that the

restructuring should be done by Congress. The concurring Justices Rehnquist and O'Connor state that the plurality went too far in its holding; it could have limited its opinion to the unconstitutionality of hearing state law proceedings and left the question of bankruptcy administration to another day. Because the two propositions cannot be separated readily, what might or might not have been good on its own must fall with what is unquestionably bad, and the corrections should be made by Congress.

The dissenting view of Justices White and Powell states that the view of the majority (Brennan, Marshall, Blackmun, Stevens, Rehnquist and O'Connor) is that the non-severability factor causes all of §241(a) to fall. The dissenting judges believe that the conclusion is wrong but acknowledge that it is the decision of the Court. Thus there is, an 8 to 1 conclusion of the participating justices that the 6 to 3 decision of the court is that all of the bankruptcy court jurisdiction of §241(a) is invalid. The constitutionality of the grant of authority to the district court was not at issue, and there seems to be no doubt about it. That subject, however, is the straw man used frequently in the subjective opinions upholding the validity of the rule.

All of the Justices who spoke on the subject concluded that Congress should provide the solution, and the Court provided two stays of judgment of approximately three months each to permit that to be accomplished. There never was a suggestion in Northern

Pipeline that a rule adopted by district courts or by a combination of district courts, circuit councils and the Judicial Conference could fill the breach. The Justices recognized that they were dealing with jurisdiction, not process, practice nor procedure.

The Northern Pipeline decision, as interpreted by the Justices, is that no court has bankruptcy jurisdiction. Three of the Justices say that the decision is wrong, including the Chief Justice who interprets the decision differently. There is no need for inferior courts to conjecture what the decision of Northern Pipeline is. Eight of the justices have stated it, to wit, §241(a), which is the jurisdiction and venue portion of the Reform Act, is invalid. A portion of §1471(c) is unconstitutional; the balance of §241(a) is so inseparably intertwined with the unconstitutional portion that the remainder cannot stand alone.

The Interim Rule

The closest thing to a definition or what kinds of matters and proceedings Northern Pipeline holds that an Article I Court cannot entertain constitutionally is:

> "the stuff of the traditional actions at common law tried at Westminster in 1789."

1789 was the first full year of the United States of America under the Constitution, which was finally ratified in the summer of 1788. In England at that time common law cases were tried

before either of two courts.[29] The Court of the King's Bench rode circuit and heard cases by and against the Crown and appeals from the Court of Common Bench. The Court of Common Bench (Common Pleas) sat in Westminster and was a court of general original jurisdiction. The forms of action heard regularly in 1789 in Common Pleas were trespass, trover, ejectment, detinue and replevin, trespass on the case, asssumpsit, covenant and debt, which essentially cover common law actions to recover money or property, tangibles or intangibles. Under Northern Pipeline all of these have to be heard by a state court or by an Article III court, as would any state statutory causes of action created subsequent to 1789. It is beyond the scope of this opinion to determine what would be the position respecting rights or actions created by colonial or state legislatures between 1607 and 1789 which might have continued in force on a local basis after Union, if there are any such rights or actions.

The interim rule purports to derive its authority from Bankruptcy Rule 927 and Rule 83 of the Federal Rules of Civil Procedure which provide respectively for

> "rules governing practice and procedure ... not inconsistent with these rules" and
>
> "rules governing its practice not inconsistent with these rules."

The interim rule is a rule creating jurisdiction, is not limited to practice and procedure, and is inconsistent with the Bankruptcy Rules and with the Rules of Civil Procedure. For example, the interim rule prohibits jury trials by bankruptcy courts; Bankruptcy Rule 115(b) provides for them. The interim rule would permit all of the facts and issues of Northern Pipeline itself to be tried by a bankruptcy court.

The entire panorama of the interim rule can be portrayed by a short series of simple questions and answers:

1. Q. Is jurisdiction always statutory?

   A. It is always established by a constitution or by statute, or both.

2. Q. Is there a statute or constitutional provision authorizing jurisdiction for bankruptcy courts?

   A. No.

3. Q. Do bankruptcy courts have jurisdiction to hear cases or proceedings?

   A. No.

4. Q. Is it constitutional for bankruptcy courts as they exist presently to hear bankruptcy cases or proceedings?

   A. It is constitutional for them only to administer federal law; either bankruptcy law or non-bankruptcy federal law.

5. Q. Is it constitutional for district courts to hear bankruptcy cases and proceedings?

   A. Yes, it is constitutional for district courts to hear cases and all proceedings, whether based upon federal or state law.

6. Q. Is there present statutory authority for district courts to exercise bankruptcy authority?

A. No. The Bankruptcy Reform Act did not contemplate that the district courts would exercise bankruptcy authority. The grant to the district courts was to be exercised by the bankruptcy courts, which delegation was found to be unconstitutionally broad under Northern Pipeline.

7. Q. How have the Judicial Conference, the Administrative Office, district courts and courts of appeals found bankruptcy court jurisdiction?

A. By mis-stating the underlying data.

As a backdrop to an understanding of the entire problem respecting the validity of the interim rules, several gauges should be kept in mind as a measure of the accuracy of the statements and language in various decisions and opinions, including this one:

1. All of the educators and commentators who have spoken on the subject have stated that the rule is invalid. Unanimity among scholars is rare, and so it is especially significant when it does occur.

2. The Administrative Office, which promulgated the rule, and most of the district courts and courts of appeals which have upheld it have relied upon misquotations and false data in supporting their conclusions. If the rule were valid, they could have cited accurately the Rules and statutory sections upon which they rely.

3. The district and circuit judges who have passed upon the rule have acted unlawfully and unethically and should have recused themselves because of their recognized bias.

One can tell from reading most of the district and circuit court opinions that they appear to be subjectively motivated, that is, the conclusions were reached first and then supporting

authority was sought to fill in the spaces. One example will be mentioned here with others to follow. Section 105(a) of the Bankruptcy Code provides, in part, "The bankruptcy court may issue any order ..." (emphasis supplied). All of the district judges can read and have two law clerks who can read. All of the circuit judges can read and have three law clerks who can read. All of the opinions state that §105 said "courts of bankruptcy", i.e. district courts. The judges used a section of the Bankruptcy Code describing an order to aid a bankruptcy court in the enforcement of its own decision as authority for a district court to delegate its jurisdiction to a bankruptcy court. It is difficult for any lawyer or layman to believe that a large group of literate individuals can all read "bankruptcy court" and write "courts of bankruptcy", and do it repeatedly, consistently and still conscientiously. It is as though there were a reading disability called "jurislexia" which prevents judges from reading accurately words or passages with which they disagree.

If the judges wish to place the blame upon their law clerks, so be it. Many of the opinions appear to have been written by law clerks. The Administrative Office, however, cannot use that excuse. The error was called to its attention long before it issued its directive of December 3, 1982.[30]

Similarly, all of the district judges and their law clerks and all of the court of appeals judges and their law clerks should know the difference between practice, process, and procedure on the one hand, and jurisdiction on the other hand. Nevertheless, consistently and uniformly they hold that statutes and rules respecting case management, practice, process, and procedure are sufficient to enable district courts to delegate their bankruptcy jurisdiction to bankruptcy courts.

DISTRICT COURT JURISDICTION

The Supreme Court took an opposite view in Northern Pipeline, holding that the significant factor was the nature of the court which was making legal decisions in the case before it and not the nature of the court which was making the administrative decisions affecting courthouse operations; the Article III mystique of the district courts did not rub off on the bankruptcy courts merely because they were called "adjuncts". Although the Court did not relate the colonial background of the Article III provision, it did emphasize the importance of salary and tenure protection.

As a matter of structure the permanent jurisdiction and venue provision of the Reform Act consisted of twelve sections (§§1471-82), added to the Judicial Code as Chapter 90 and to become effective April 1, 1984; all of that constituted §241a of the Reform Act. §405 of the Reform Act caused §241a to be

incorporated by reference, so that §§1471-82 were operative after October 1, 1979, with respect to cases filed on or after that date. §1471(a) gave to the district courts the original and exclusive jurisdiction of all cases under the Bankruptcy Code. §1471(b) gave to the district courts original but not exclusive jurisdiction of all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. §1471(c) gave to the bankruptcy courts authority to "exercise all of the jurisdiction conferred by this section on the district courts." Northern Pipeline was a civil proceeding arising in a case under title 11. As a debtor, Northern Pipeline brought a breach of contract action against Marathon Pipe Line Co.

The Administrative Office takes the position that Northern Pipeline eliminated only §1471(c) as unconstitutional and that §1471(a) and (b) remain intact. The preceding portion of this opinion assumed that position, arguendo, to determine whether bankruptcy jurisdiction could have been, and was delegated to the bankruptcy courts by the district courts. This court concluded above at pages 10-38 that:

(a) the district courts did not have a power of delegation, and

(b) did not exercise validly any power of delegation which might have existed.

The rule-making power which had been given to the district courts was limited to practice, process and procedure and did not extend to the creation of a rule granting jurisdicstion.

The position taken by the Judicial Conference, the Administrative Office, and many of the courts, particularly the Sixth Circuit Court of Appeals and many district courts, has a superficial resemblance to that contained in law school moot court arguments. The opponents are given opposite sides of an argument which they must defend. They may not desert their assigned roles of making the best case possible for a proposition with which they may disagree intellectually. The groups mentioned above have not made a critical analysis; they have not recognized that every educator who has spoken on the subject has taken the side of invalidity, they either have fabricated their authorities or have relied on authorities fabricated by others. In other words their approach appears not to have been intellectually honest and judicial but has been political and subjective.

The only honest way to consider the issue is to recognize that one of the dominant purposes of the entire Bankruptcy Reform Act was to place within a single court the authority to determine all aspects of a bankruptcy case and its proceedings. Because of the intervention of the Chief Justice the format was switched from an authorized Article III bankruptcy court to an authorized Article III district court whose powers would be exercised by a

bankruptcy court. The Congress did not want the district courts to exercise bankruptcy authority; the Congress knew that the district courts were unwilling to exercise bankruptcy authority. Many of the district judges have been contending for years that they are so over-worked that diversity jurisdiction should be eliminated, which would reduce their caseloads by between 20% and 33%.[30] Consequently, any argument that the Congress intended that district courts should retain bankruptcy jurisdiction in the event of the unconstitutionality of §1471(c) is contrary to reality. If, in the final frantic moments of the conclusion of the 95th Congress, serious doubts had continued to exist about the constitutionality of §1471(c), it appears almost certain that the bill would not have been enacted; it was too late, after both houses had scheduled adjournment, to restructure completely the entire judicial machinery which was to be used to implement the broad substantive changes.

The vehicle which became the Bankruptcy Reform Act was H.R. 8200. It had contemplated an Article III bankruptcy court throughout. There was no need for contingency plans in the event of unconstitutionality because the question would not have arisen if the judicial structure had remained an Article III bankruptcy court. §§404 and 405 of the Reform Act were not changed to reflect the last minute changes made in §241(a), specifically, §1471 of the Judicial Code. Thus, it is contrary to the facts to

state that either §404 or §405 was written with the present circumstance in mind. They had been written in their present form more than one year before the transfer of jurisdiction to an adjunct had been devised, and they were not designed to contend with that issue. All that §404 and §405 were intended to achieve, was to permit Bankruptcy Act cases to continue as before and also to permit the court structure which would be in place permanently after April 1, 1984, to function in the same fashion during the transition period, October 1, 1979 - March 31, 1984, with respect to newly filed cases.

Judicial Code §1331 and §1334

Many courts which have assumed the validity of the rule appear to have been looking for some authority to support that pre-determined position; they have lighted upon either or both §1331[32] and §1334[33] as their foundations; they have built upon sand.

§1331 is derived from an earlier statute first adopted in 1875.[34] There was not in effect at that time any bankruptcy act. To say that §1331 provided bankruptcy jurisdiction is ridiculous. There was no substantive law upon which it could operate when it was enacted. Laws are not created in a vacuum. In any event, the procedural bankruptcy law in the United States always has been adopted as a part of a package including the substantive law. Neither ever has existed without the other.

The powers of the various federal courts were addressed in 1911 with the adoption of the Judicial Code. As a code it expressed most of the powers of all of the federal courts. The jurisdiction and venue of the various courts are set forth in Part IV:

Chapter 81 - Supreme Court - §§1251-58

Chapter 83 - Court of Appeals - §§1291-1296

Chapter 85 - District Courts - §§1330-1364

The jurisdiction granted to the district courts in Chapter 85 covered most of the express powers granted to the Congress by Article I, Section 8 of the Constitution, other than those respecting the military, the District of Columbia, and the coinage of money. Nevertheless, most subjects over which the Congress has been empowered to act have been authorized by detailed specific legislation limited to the precise power under consideration and have not relied on Chapter 85. Examples are the enforcement methods governing the collection of taxes, interstate commerce, postal laws, maritime statutes, and patent Laws. It is contrary to the historical pattern of the enforcement of the express powers granted to the Congress to leave the enforcement of them to some general short form act, such as is suggested for §1334 in the present circumstance respecting bankruptcy. There have been five distinct bankruptcy statutes in the history of the United States, each of which specified in what court it would be enforced and

described the jurisdiction of that court, or those courts, to act. Never has there been a reliance on such token statutes as §§1331 and 1334 which respectively provide as follows:

> "§1331. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
>
> "§1334. The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

§1334 will be discussed more fully below. For the moment it will be sufficient to describe how limited it would be in scope even if it were applicable. The key to the present analysis is "all matters and proceedings in bankruptcy." Those words have to be construed as they were used in 1911.

"Proceedings in bankruptcy" was a term of art which applied to internal management of a case, such as allowance or denial of a discharge, adjudication in bankruptcy, and discretionary issues relating to pleadings, notice, intervention, and so forth. These were all questions of bankruptcy law and so these were within the bankruptcy authority of the district court and of the referee. Where an issue arose between the debtor and a third party respecting a "proceeding", that adversarial action was described as a "controversy in a proceeding", or just as a "controversy." The district courts as courts of bankruptcy and the referees had jurisdiction over controversies respecting management problems and also over controversies respecting property of the estate,

both of which are bankruptcy questions from which state courts are excluded. These are within the summary jurisdiction of the courts of bankruptcy.

Where a contested action related to the collection of a debt or damages for breach of contract, it usually was a matter of non-bankruptcy law, either state or federal. It did not come within the bankruptcy jurisdiction of the district court as a court of bankruptcy nor of the referee, except in actions by a trustee or receiver under §§60, 67, or 70. If it happened to fall within any of the jurisdictions of a district court, qua district court, the action could be maintained in either the district court under its plenary jurisdiction, or in a state court. It could not be brought before the referee nor the district court as a court of bankruptcy.

Consequently, even should it be determined that §1334 has some kind of residual vitality, nevertheless, that would permit only the administration of actual cases and would not permit the district court as a court of bankruptcy to hold hearings on non-bankruptcy matters; the same is true for the bankruptcy court. On non-bankruptcy matters the jurisdiction of the district court would be a non-bankruptcy jurisdiction based upon diversity, admiralty, postal, federal question, or whatever. The point is that even

(a) if §1334 did provide bankruptcy jurisdiction, and

(b) the basic interim rule were valid,

the authority of the bankruptcy courts under the rule would be very narrowly limited to the administration of cases and controversies concerning property within the possession of the court. The added jurisdiction respecting actions by trustees and receivers under §23b would be gone as would the "consent" jurisdiction under §2a(7). About the only adversary proceedings which the bankruptcy courts could hear would be those in which a modification of the automatic stay was sought. The meaningful adversary proceedings to the estate such as recovery of preferences, would have to be brought in state courts or on diversity grounds in the district court, causing the jurisdiction of the bankruptcy courts in practical terms to be about 1/3 of what it was under the Bankruptcy Act.

Even if a court in a subjective decision should hold that under the interim rule the district court has delegated authority to the bankruptcy court, the district court could not delegate any more than it had, which is very little. Similarly, should the district court withdraw a reference under C(2) of the rule, there is almost no space in which the district court can operate if its jurisdictional reliance is upon §1334.

Many of the subjective opinions state that the Congress carefully preserved §1334 to take care of just such a contingency as exists today, which is nonsense.[35] There was a sound legislative reason for leaving §1334 intact, in addition to which there was a practical consideration. The fanciful statements listed in the footnotes add nothing to the jurisprudential reputations of their declarants. Here again, the tenured judges refuse to deal with the facts.

The Bankruptcy Act of 1898 was repealed as of October 1, 1979 by §401(a) of the Reform Act, with the limitations of §403(a) that all cases and proceedings filed under that Act should continue to be heard as if the Act had not been repealed. §1334 was a part of the Judicial Code and stood aloof and apart from the Bankruptcy Act. It never had been considered as having any jurisdictional effect. If it continued in force, the old cases would be administered in the same manner that they always had been in the past. If §1334 had been repealed by the Reform Act, a question would have arisen as to what the effect of the repeal was on the old cases. It would have opened a Pandora's box of jurisdictional contentions. (These always have been the principal deterrent to an efficient and expeditious bankruptcy administration). Leaving §1334 in place meant that new types of questions would not be raised with respect to old cases.

A practical mechanical reason for leaving §1334 in place related to the different approaches to jurisdiction which were under way in the two houses of Congress. H.R. 8200 was the House proposal, which contemplated an Article III bankruptcy court based upon §1471 essentially. S.2266 was the Senate proposal, which contemplated an Article I bankruptcy court based upon an expanded §1334. To a limited degree correlation between the staffs of the two houses was simplified if the House version did not repeal the foundation stone of the Senate Bill.

Developments in the 1930's are an additional proof that §1334 did not have the force which is attributed to it currently. There was a desire to enhance bankruptcy powers to provide for greater flexibility for extensions and compositions. The Bankruptcy Act was amended by the addition of §73 and §77A,[36] consistent with the historic principle of having jurisdiction and substance within the same bankruptcy statute. The procedural amendments would not have been necessary if §1334 had been a bankruptcy force, as contended by the proponents of the interim rule.

It is more likely than not that the issue of retaining §1334 never was faced squarely. If it had been addresssed, it would have been at a time when bankruptcy courts were slated to be Article III courts, more than one year before the last minute change to Article I status. A condition such as exists presently

could not have been contemplated as a contingency because there would have been no constitutional problem in having an Article III bankruptcy court deal with Article III issues.

Sticking to the facts and not engaging in self-serving flights of fancy, as many of the subjective opinions do, we find that §1334 never was relied on to be the basis for bankruptcy jurisdiction.[37] The most concrete method of establishing that point is to look at bankruptcy jurisdiction before the enactment of §1334 as a part of the Judicial Code in 1911 and then to take a second look after 1911. One will find that the jurisdiction did not change. In the view of all observers bankruptcy jurisdiction was the same before as after §1334 was adopted. It was an in rem jurisdiction, uniformly called "summary jurisdiction", supplemented by an in personam jurisdiction over actions by receivers and trustees to recover property under Sections 60, 67 and 70 of the Bankruptcy Act (§23b).

This Court is aware of only two treatises or comments which ever suggested that §1334 provided jurisdiction to bankruptcy courts or district courts as courts of bankruptcy prior to the fall of 1982 when the Administrative Office began to float its theories of continuing jurisdiction for bankruptcy courts.

The legislative history respecting the enactment of §1334 which is readily available does not reflect any strong reason for its enactment other than the fact that the laws respecting

federal jurisdiction were being compiled into a code. Most of the express powers of Congress are given sections in the Judicial Code, even though the bulk of the judicial authority respecting them is in other acts which are primarily substantive, just as bankrutpcy law and procedure always had been combined until the adoption of the Bankruptcy Code.

The substance of §1334 was repealed as of March 31, 1984, and a new appellate process was established commencing April 1, 1984 using the same section number. By cross-reference under the provisions of §405(c)(2) the new §1334 became operative during the transition period. A good argument can be made that the old §1334 was repealed by implication as of October 1, 1979, just as it was expressly as of April 1, 1984, because otherwise there would have been in operation two sections numbered 1334 with different substantive provisions occupying the same section number. The argument, however, conflicts with the more logical proposition that §1334 was kept in place to avoid jurisdictional confusion in pending Bankruptcy Act cases. For example, if §1334 had had some jurisdictional significance and was repealed, would the controlling law have been that on the date of the filing of the case, or on the date of the enactment of the repeal, or on the effective date of the repeal, or on the date of discharge, and so forth?[38]

A person who is not familiar with the politics of the courts has no good way of knowing whether the Judicial Conference of the United States, the Administrative Office of the United States, Federal Judges Association, and individual tenured federal judges should be treated as a unit or separately in describing how the present chaos evolved.

The chief judges of the circuits presently are faced with a dilemma. If possible, they probably would like to avoid having to admit having made a mistake. They also may be presumed to be reluctant to crack down in a public way upon the Judicial Conference staff which promoted the rule or the Committee on Bankruptcy Administration which devised the rule, because in doing so there is a tacit admission that the chief judges, being the permanent members and constituting one-half of the Conference have not been supervising the workings of the Conference with sufficient detail and care. Just as it is difficult for a Board of Directors to exculpate itself from staff activities of a corporation, the chief judges face the difficult problem of trying to correct a situation without admitting that anything is wrong.

This opinion has commented throughout on the seeming subjective attitude toward the interim rule of most tenured federal judges, without specifying what they are seeking and why. Their attitudes may vary in kind and in degree but probably they are encompassed within the principles enunciated by Judge Simon

Rifkind, formerly judge of the District Court of the Southern District of New York and president of the American College of Trial Lawyers, as the issue of Article III status for bankruptcy judges was being debated in 1978:

1. "... district courts are courts of general jurisdiction, whose judges are required to deal, on a daily basis, with the full range of substantive law ... As long as bankruptcy cases are tried by Federal district judges exercising a general jurisdiction, the winds of change of legal doctrines will be felt in the bankruptcy law degree as in the general law.

2. "If bankruptcy cases are tried in a specialized trial court, they will be insulated from the rest of the law... In addition, a specialized bankruptcy court would have other unfortunate consequences. To some extent, a specialized bankruptcy bar has already begun to develop. If a specialized bankruptcy court, with its own procedures, were established, this specialization would be aggravated.

3. "... a significant increase in the number of Article III judges, contemplated by the proposed law, would dilute the significance, and prestige of district judgeships. Prestige is a very important factor in attracting highly qualified men and women to the federal bench... Creation of a specialized bankruptcy court would lead to wholesale appointment of current bankruptcy referees." Rifkind: 52 Am. Bank L. J. 187, 188, 819, 192 (Spring 1978).

Nominally, at least, the current philosophical basis for the opposition to Article III status by the Judicial Conference, Administrative Office, Department of Justice, Federal Judges Association, American Bar Association and American College of Trial Lawyers is point numbered 1, that there should be maintained the historic traditional principle of a single general jurisdiction trial court. When one removes the red, white and

blue bunting, he sees that the district court will not be trying bankruptcy cases under any circumstances. Although red, white and blue are not the customary colors of camouflage, they can be extremely effective in certain arenas.

The only way that the district court is going to try bankruptcy cases is if there is a bankruptcy division set up within the district court, so that sitting district judges can continue as before and new appointees can hear bankruptcy cases. That the single trial court is not in fact the objective of the organizations listed above is demonstrated by the fact that they were as opposed in the fall of 1982 to the idea of a bankruptcy division of the district court as they were to the creation of an independent bankruptcy court.

Normally a majority of the members of any bar association are general practitioners and, reflecting the views of the majority, a bar association will oppose any form of specialized bar. Presumably that is the basis for the American Bar Association stance.

Precedents

An individual analysis of the district court and court of appeals cases upholding the validity of the rule will not be made because they have so many common elements. For example, every one of them contains two or more of the following distortions.

1. §105 of the Bankruptcy Code

(a) "bankruptcy court" means "district court",

(b) "order, process, or judgment" means "jurisdiction."

2. Rule 927 of the Bankruptcy Rules

(a) "not inconsistent with these rules" means "inconsistent with these rules",

(b) "practice and procedure" means "jursidiction";

3. Rule 83 of the Federal Rules of Civil Procedure

(a) "not inconsistent with these rules" means "inconsistent with these rules",

(b) "practice" means "jurisdiction";

4. Rule 53(b) of the Federal Rules of Civil Procedure

"A reference to a master shall be the exception and not the rule" means that a standing master may be appointed to hear every case;

5. §2071 of the Judicial Code

"conduct of their business" means creating jurisdiction for other courts;

6. §2072 of the Judicial Code

"process, writs, pleadings, motions, practice and procedure" means "jurisdiction";

7. §2075 of the Judicial Code

"process, writs, pleadings, motions, practice and procedure" means "jurisdiction";

8. §331 of the Judicial Code

(a) "management procedures and expeditious conduct of court business" means "jurisdiction";

(b) "practice and procedure" means "jurisdiction";

(c) "simplicity in procedure, fairness in administration" means "jurisdiction";

9. §332 of the Judicial Code

"expeditious administration of justice" means "jurisdiction"; or

10. §604(a)(3) of the Judicial Code

"business of the courts" means "jurisdiction".

One of the most common explanations of the contended validity of the interim rule is to start by stating that a grant of bankruptcy authority to district courts is constitutional, therefore, the rule delegating the authority is valid. The syllogism is incomplete because

(a) there is presently no valid grant of authority to the district courts, and if there were one,

(b) it would have to be exercised by the district courts, or there would have to be a statutory authority for delegation.

Not a single one of the cases upholding the rule looked at the whole of §241(a) and recognized that more than one-half of the twelve sections constituting it (§§1471-1482) contain venue and jurisdiction provisions directed expressly to bankruptcy courts. Even if the argument of the Chief Justice were adopted that only §1471(c) was held unconstitutional in Northern Pipe-

line, the same internal conflict would exist between §1471(a) and (b) and §§1472-82 as had existed between §1471(a) and (b) and §1471(c). There still would be Article I courts exercising power under §§1472-82 which had been granted to Article III courts in §1471(a) and (b).

Many of the decisions take the position that the rule is necessary as policy matter, ignoring the separation of powers doctrine that policy is established by the Congress. Buckley v. Valeo, 424 U.S. 1 (1976). If there had been no rule in 1982, Congress would have acted. During all of 1983 Congress has been in a position where it could have acted promptly if a vacuum had developed.

Many of the district court decisions state that §§404 and 405 were written to take care of the void which might be created in the event that §1471 should be held unconstitutional. There is absolutely no truth in that contention; nothing would be served by characterizing the motivational basis for the false statements. §404 and §405 were designed to keep the existing bankruptcy court structure intact and to provide a method for concluding cases and proceedings filed under the Bankruptcy Act. They were put in their present form at a time that H.R. 8200 provided for an Article III bankruptcy court, so that there was no need to contemplate a void, because none would arise if an Article III court had all powers.

Two recent decisions will be discussed in detail; White Motor Corporation v. Citibank, N.A., Slip op. No. 82-3638, decided April 1, 1982 (6th Cir. 1983); and In re Lear Colorprint, slip op. No. 82-A3460, decided April 19, 1983 (N.D. Ill. 1983). Each of them demonstrates the breadth of the quagmire in which the federal courts currently find themselves.

White Motor dealt with two issues, of which one is not present in any of the motions before this court and consequently will be disregarded; that is, whether a district court can appoint a special master. The jurisdictional phase of the decision makes clever use of the big bluff technique of stating that something has been established and then proceeding from that point as though the point has been established. For example, at page 10,

> "... it does not necessarily mean that the bankruptcy courts lack a more limited derivative or referred jurisdiction as a result of delegation by Article III judges acting pursuant to the authority vested in them by Congress." (emphasis added).

Congress did not vest in the district courts or circuit councils any authority to delegate, and thus the Sixth Circuit could not cite any authority for that proposition. The statement is the kind of trap for the unwary which is interspersed throughout most of the subjective decisions. Among those who recognize the bootstrap device, its use does not imbue readers with any confidence in the integrity of the court.

The second device which the Sixth Circuit and others have employed rather effectively is the use of a straw man, which is the constitutionality of a grant of bankruptcy power to district courts. Nobody ever has doubted that such a grant can be made constitutionally, provided that the district courts themselves exercise the power. The Constitutional question is whether the Congress can grant plenary bankruptcy power to the district court to be used by another court. Even if §1471(a) and (b) should remain intact and should be considered to have survived the collision with Northern Pipeline, such a conclusion is not relevant unless joined with a statutory authority to delegate the power if it is not to be used directly by the district court.

On page 14 the opinion states:

> "Congress delayed the repeal of §1334 until the Constitutional question could be settled."

There was no constitutional question at that time of a decision to delay, if there was one, because when the status of §1334 was set, bankruptcy courts were scheduled to become Article III courts.

The doctrine about revival of a repealed statute by a decision of unconstitutionality of the repealer is not applicable to §1334 in any event. §1471 did not replace §1334; it replaced §§2a and 23a of the Bankruptcy Act. If the doctrine is applicable, it would be §§2a and 23a that would be brought back under a circumstance where the substantive law and procedural law would not mesh.

On page 15, the court states:

> "The district courts have both the authority to adopt the interim rule and the obligation to provide for the continuing orderly conduct of bankruptcy proceedings."

The court does not cite any authority for that proposition because there is none. The statement is not true. The Court also says,

> "We hold that the interim rule does not violate federal statutory and constitutional principles..."

Here again the court does not cite any authority, but if it had checked out the point it would have found the following cases directly to the contrary.[39]

On page 16, the following are not supported by authority, and in fact are not true:

> "... the district courts have statutory authorization to adopt the interim rule. The rule was initially promulgated under specific statutory provisions directed to the Judicial Conference and the Judicial Councils of the Circuits."

Not true: White Motor speak with forked tongue. In addition, the Sixth Circuit is following the same questionable procedures as the Administrative Office in misquoting its authorities, to wit;

quotation of Sixth Circuit

> "The Conference ... shall submit suggestions to the various courts in the interest of uniformity and expedition of business"

actual statute

"The Conference ... shall also submit suggestions and recommendations to the various Courts to promote uniformity of management procedures and the expeditious conduct of court business." (empnasis added).

This Court repeats what it has stated previously. If the rule were valid, there would be no necessity to fabricate authority for it. All that would be necessary is to cite the authority.

§332 also is misquoted in White Motor. As quoted,

"Each Judicial Council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

The section actually reads,

"(d)(1) Each Judicial Council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals at the direction of the chief judge or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council."

On page 17, footnote 4 further carries on the inaccuracies. Bankruptcy courts are not defined in §404(a) of the 1978 act. That section provides in part,

> "The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under 2a of the Bankruptcy Act... shall continue through March 31, 1984..."

Where it suits the purpose of the proponents of the interim rule, they interchange "courts of bankruptcy" and "bankruptcy court" depending upon whether at that juncture they wish to have the district court exercise a function assigned to the bankruptcy court or vice versa.

On page 18, the court states,

> "Although the district courts have the authority to adopt rules for the administration of bankruptcy cases which are within their jurisdiction..."

No authority is cited because there is none. The statement is not true.

Further on page 18 it is stated,

> "The bankruptcy courts have only derivative jurisdiction. They do not operate under an exclusive grant of jurisdiction as in §1471(c) but rather derive their jurisdiction from the district courts as under the Chandler Act."

This is not true. The bankruptcy courts did not derive their authority from the district courts under the Bankruptcy Act, they derived them from the Congress, as all courts must:

> "§34. The judges of the several courts of bankruptcy shall appoint referees..."
>
> "§38. Referees are hereby invested ... with jurisdiction to ..."

(11 U.S.C. §§62 and 66, repealed).

The bulk of the authority was established 40 years before the Chandler Act.

It may be that in the nearly 200 year history of the federal court system there has not been an opinion of a panel of judges which shows such a lack of judicial integrity. The decision quotes the late Edward H. "Bull" Warren, prototype for Professor Kingsfield in "The Paper Chase." In speaking of trial advocacy, the Bull used to tell his classes,

> "The only way to be successful is to seem fair, and the only way to seem fair is to be fair."

The same is true of judges. The only way that they can hold the respect of the general public is to seem fair. They cannot reach decisions which are contrary to law and maintain respect. They cannot base their explanations upon matters which are not true and expect that lawyers and laymen will have faith in them in the future. They cannot state that a statute says something different from what it does say and expect that future decisions will be afforded recognition.[40]

In re Lear Colorprint is a recent decision of Judge Will of the Northern Illinois District Court. In his letter of transmittal to other judges of the district, Judge Will states, in part,

> "bankruptcy judges, as ancillary judges of this Court, like magistrates, have jurisdiction to proceed in related proceedings---"

What Judge Will fails to relate is that magistrates are provided for in Chapter 43 of the Judicial Code, §§631-639. There is a statutory basis for them; Congress has given them a jurisdiction. There was a similar portion of the Judicial Code earmarked for bankruptcy judges --- Chapter 90, §§1471-1482, which was §241a of the Reform Act and which Northern Pipeline said is invalid because it was inseparably linked to §1471(c), which was declared unconstitutional. There still exists a statutory basis for the judicial work performed by magistrates; there is none for bankruptcy judges.

Several of the points in the opinion will be discussed, so that the flaws in the reasoning may be brought to the surface. Judge Will indicates that Northern Pipeline only held a portion of §241(a) to be unconstitutional, namely, §1471(c). From that he concludes that the balance of §241(a) is valid. Like so many of the other district judges, Judge Will skips a step. The fact that the remainder of §241(a) may be constitutional does not make it valid statutorily. Justice Rehnquist points out the constitutional part of §241(a) is inseparable from the unconstitutional and thus it is invalid, although without the close connection, it might have been valid.

Judge Will cites the Chief Justice as stating that a simple solution is available. The Chief Justice is correct that it would be a relatively simple solution for Congress to provide

that bankruptcy courts should administer cases and that district courts should administer ancillary common law actions --- simple on the drawing board but difficult to effectuate. The district courts just would not handle the ancillary actions. They contend now that they are overworked and need to be relieved of diversity of citizenship jurisdiction (§1332). Taking on ancillary actions would increase their caseloads by about 25%. What the Chief Justice and Judge Will overlook is that the simple two-tiered arrangement of which they speak would seriously impede the overall administration of bankruptcy cases. The conclusion of ten years of study ending in 1978 was that a single court was the only way by which efficiency might be achieved.

Judge Will uses the standard description by district judges of the cerebrations of Congress respecting §1334, to the effect that Congress purposely left it in place until April 1, 1984 to take care of the present situation. This disregards the fact that when the decision, if any, to leave §1334 is place was made, it was at a time that bankruptcy judges had Article III status under H.R. 8200. Article III bankruptcy judges were to consider Article III issues, so that no constitutional issue would arise. No decisions were made respecting §1334 in the final breathless days before adjournment, when the status of bankruptcy judges was reduced at the behest of the Chief Justice.

Judge Will suggests that §1471(a) and (b) remain valid and that Northern Pipeline merely eliminated §1471(c). Assume for the moment that such was the first step and that district courts continued to have bankruptcy power. Under §1472 a case in which the district court had jurisdiction would be filed in the bankruptcy court of the debtor's residence. Under §1473 adversary proceedings would be filed in the bankrutptcy court where the case was filed, and so forth. Under §§1472-1482, which together with §1471 make up §241(a), one would still see Article I courts trying Article III issues. §§1471-82 are interrelated. If §1471(c) is unconstitutional, much of §§1472-82 also is unconstitutional and for the same reason.

Furthermore, if all that Northern Pipeline did was to hold §1471(c) unconstitutional, leaving §1471(a) and (b) intact, it would mean that district courts would have jurisdiction over bankruptcy cases under §1471(a) and over proceedings under §1471(b), but that bankruptcy courts would continue to have jurisdiction over property of the estate under §1471(e). The district court and the bankruptcy court would be stumbling over each other continuously, because the property within the control of the bankruptcy court would be the most important element in determining the results of the case.

Finally, the enabling legislation of §73 and §77A would not have been necessary to establish jurisdiction relating to rehabilitations if §1334 had had the broad sweep of authority which proponents of the interim rule like to ascribe to it.[41]

The opinion states

> "This Court and the Bankruptcy Judges of this Court are, therefore, obliged to implement and adhere to the General Order as directed by the Judicial Council of the Circuit."

Not so. The authority for Judge Wills assertion is §332(d)(1) of the Judicial Code which he removes from its context, quoting only

> "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."

Let us suppose that the Circuit Council should determine that the Speedy Trial Act and increases in criminal case filings had caused the district courts to develop a backlog in the administration of their civil calendars which the bankruptcy judges should relieve by taking on certain classes of criminal cases. Without a Congressional direction providing statutory authority, this Court would not respect a rule of that nature. This Court feels that its responsibility is to support the whole Constitution and to resist the usurpation of powers by any of the three branches of government.[42]

Whether the Judicial Council order was "necessary" is debatable. Without the interim rule and assurance from the Judicial Conference that legislation was not necessary in 1982, there would have been legislation in 1982. At the present time, Congress could pass legislation within two weeks because the Senate has passed a bill and the House has cleared a jurisdictional bill through its Judiciary Committee. The House bill (H.R. 3) provides for an Article III bankruptcy court and efficient administration. The Senate Bill (S.1013) provides for an Article I court and a cumbersome procedure. Either one of them produces a statutory grant of jurisdiction. (The probabilities are that the Senate bill will run into the Northern Pipeline roadblock if enacted). The point is that absence of jurisdiction is no reason to support an unconstitutional rule --- better to wait two weeks and have something upon which everyone can rely.

The opinion sums up,

> "we conclude that this Court [the district court] --- as the Judicial Council has explicitly recognized --- has the power pursuant to 11 U.S.C. §105(a), to promulgate the General Order..."

Judge Will has been a member of the district court for 22 years and for a number of years was a member of the Commission on the Bankruptcy Laws of the United States. He should know the difference between the district court and the bankruptcy court.

He does know how to read. He should be able to look at §105 and see that it says "The bankruptcy court" and know that it means "the bankruptcy court."

This court has not seen the minutes of the meeting at which the Judicial Council adopted the interim rule but would be willing to wager something other than money that nobody attending that meeting pointed out to the others that §105 reads, "The bankruptcy court". The odds are very strong that the judicial Council swallowed whole the package submitted by the Administrative Office and did not even seek comments from nor criticisms by somebody familiar with bankruptcy law.

Footnote 3 discusses §105 and also Fed. R. Civ. P. 53, which states expressly,

> "(b) A reference to a master shall be the exception and not the rule."

Furthermore, there is no reason that a bankruptcy judge should accept a standing assignment. The concept of footnote 2 is not original with Judge WILL but has appeared in several subjective opinions and is poorly conceived. The theory goes that even assuming that from 1911 until 1978 §1334 was limited to bankruptcy cases and did not provide jurisdiction to hear bankruptcy proceedings, that limitation now has been removed as a result of the repeal of the 1898 Act. In other words, §1334, without any

Congressional action respecting it, is converted from a summary jurisdiction statute to a plenary jurisdiction statute by the repeal of a different summary jurisdiction statute.

Footnote 1 says,

> "I find no basis for concluding that the 1978 Act was intended to repeal all bankruptcy jurisdiction in the District Courts between 1978 and April 1, 1984."

The judge should have read §1471(c),

> "The bankruptcy court for the district ... shall exercise all of the jurisdiction conferred by this section on the district courts"

and also §405(b)

> "During the transition period [October 1, 1979 - March 31, 1984], the amendments made by sections 241 ... of this Act [Bankruptcy Reform Act of 1978] shall apply to the courts of bankruptcy continued by section 404(a)..."

Section 241, of which §1471(c) is a part, is the section covering jurisduction and venue in which jurisdiction was granted to the district courts in §1471(a) and (b) and taken away by (c).

It is correct that this arrangement never was discussed publicly because the public discussion had resulted in a §1471 consisting of two subsections, both granting jurisdiction directly to the bankruptcy courts. The change came following, and as the result of, a telephone call from the Chief Justice to Senator Thurmond. Any discussions which took place were at closed meetings between Attorney General Bell, presenting the viewpoint of the Chief Justice, and Senators or members of their

staffs. The result of their agreement was presented on the consent calendar of both houses and never was debated, nor otherwise discussed publicly.

The following assertion of Judge Will is not true and to that extent creates an appearance of desperation in attempting to establish a point:

> "'The Judicial Council's order was undeniably "necessary ... for the effective and expeditious administration of justice.'
>
> The chaos and hardship to litigants that would have ensued at the expiration of the Marathon stay, had there been no uniform procedure for carrying forward the business of federal bankruptcy jurisdiction, are universally acknowledged."

Contrary to Judge Will's contention that the interim rule was "undeniably necessary" and "universally acknowledged" to be such, the fact is that the consensus of informed observers in Washington was that an Article III status for bankruptcy judges would have been enacted into law in 1982 if it had not been for the lobbying by the Judicial Conference and the district court judges with their assurance that a law was not necessary because the interim rule would cause the courts to continue to function. The interim rule became a self-fulfilling prophecy in which the district court judges have a vested interest because of their prior assurances to members of Congress.

Judge Will also states:

> "and it further appears that the delegations to Bankruptcy Judges contained in the General Order satisfy the Constitutional concerns expressed the plurality and concurrence in Marathon. See 102 S.Ct.at 2875-76; United States v. Raddatz, 447 U.S. 667, 682, 685 (1980); Crowell v. Benson, 285 U.S. 22, 51, 54 (1932)."

Most persons familiar with Judge Will believe that he is astute enough to recognize that both of the cases which he cited relate to the scope and extent of a delegation authorized by Congress. To the degree that there is a delegation under the interim rule, it is by the district courts. It is not a question of how much jurisdiction the district court can delegate; the question is whether it can delegate any jurisdiction whatsoever.

There are a number of excellent analyses of the interim rule, mostly by bankruptcy judges. Comparing their opinions with those of district court judges might cause one to believe that bankruptcy judges are more scholarly than district court judges. Such a broad generalization from such a limited sampling is not warranted, although selective comparisions frequently would produce that conclusion.[43] Probably all that can be said by way of generalization is that the results reinforce a conclusion that has been held for centuries —— it is easier to analyze than to synthesize. All that the bankruptcy judges had to do was to assemble the data, arrange it in a logical sequence, and announce the final result. On the contrary, many district judges appear

to have manufactured data, or use data fabricated by others, which would have to be made to fit in with their preconceived conclusions. Among other things, this meant:

1. deleting "not inconsistent with these rules" where the interim rule was in fact inconsistent with the Federal Rules of Civil Procedure or the Bankruptcy Rules;

2. saying that "bankruptcy court" means "district court"; and

3. saying that "process, practice and procedure" mean "jurisdiction".

Not only did the district judges distort the clear meaning of words, they had to do it in a manner which would not cause their manipulations to be obvious to the average observer. Their efforts frequently were clumsy and do not inspire confidence.

Public confidence is a perishable commodity which will not stand abrasion successfully. Governance is based upon the consent of the governed. All of the policemen in the world cannot maintain a peaceful society unless a majority of the citizens have confidence in the integrity of their public officials. Whenever a public official misbehaves, he causes an infinitismal erosion in the public confidence of all other public officials and makes their jobs more difficult to perform. The tenured judges have hurt not only themselves but all other judges, and also non-judicial public officers. And to what end?

Many of the district court cases upholding the interim rule speak of the necessity for it, as though that would give to the district courts the power to establish bankruptcy jurisdiction for bankruptcy courts. They do not cite any authority for the proposition because there is none. The contention is contrary to the established structure of the American government and also contrary to historical facts.

There have been five American bankruptcy acts which have covered slightly over one-half of the lifetime of the Union ---99 years out of 195. Whether there should be in effect at any given time a national bankruptcy law is a matter of policy, within the exclusive domain of Congress. Both Blount v. Rizzi, 400 U.S. 410, 419, 91 S. Ct. 423 (1971) and U.S. v. 37 Photographs, 402 U.S. 363, 369 91 S. Ct. 1400 (1971) use the same language, "it is for Congress, not this court, to rewrite the statute." If the Supreme Court cannot legislate, certainly the district courts cannot.

> "This Court can know nothing of public policy ... It has no legislative powers... It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general, be addressed to the legislature." License Tax Cases, 5 Wall (72 U.S.) 462, 469, 18 L.Ed. 497 (1866).
>
> "But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97, 101 S. Ct. 1571 (1981).

What the rule does is to provide jurisdiction to bankruptcy courts. The establishment of jurisdiction of lower federal courts is a Congessional prerogative. Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 70 S. Ct. 876 (1950), Lockerty v. Phillips, 319 U.S. 182, 63 S. Ct. 1019 (1943).

CONCLUSION

The course of action for this court to follow was expressed in Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868).

> "Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."

1. This Court does not have jurisdiction because the statute granting jurisdiction to it was held unconstitutional in Northern Pipeline.

2. The district court does not have jurisdiction because the jurisdiction granted to it under §1471(a) and (b) was not intended to be exercised by the district court.

3. Even if the district court did have jurisdiction, it could not delegate that jurisdiction to the bankruptcy court in the absence of a statute authorizing such delegation.

All motions to dismiss are granted without prejudice to a refiling of cases and complaints without additional filing fees or costs at such time as there shall be enacted by Congress and signed by the president legislation establishing jurisdiction for bankrutpcy courts over bankruptcy cases and proceedings arising in or related to bankruptcy cases. Separate orders will issue with respect to each case and proceeding at issue.

Enter:

RICHARD L. MERRICK
Bankruptcy Judge

May 6, 1983

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS-EASTERN DIVISION

IN THE MATTER OF
PAUL C. WILDMAN, et al.,
Debtor

IN BANKRUPTCY
No. 81 B 5869

FOOTNOTES

1. This was a construction of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, passed November 6, 1978, effective October 1, 1979, referred to herein as the "Reform Act."

2. The order of the Judicial Council of the Seventh Circuit and the order of the Northern District of Illinois are attached as Appendix I.

3. "The issue of the jurisdiction of the bankruptcy court has been litigated in every volume of the Federal Reporter. ...In an area of law in which time is of the essence, the delay attendant upon litigation over jurisdiction is needless and expensive." H. Rep. No. 595, 95th Cong., 1st Sess. 43(1977) (footnotes omitted). The following cases illustrate the delay inherent in litigating the jurisdictional issue: Burham et al v. Todd, 139 F.2d 338(5th Cir. 1943)(10 years), Katchen v. Landy, 382 U.S. 323(1966) (6 years), Bank of George W. Cohen Co. Inc. v. Henderson, 268 U.S. 111(1925) (5 years), First National Bank of Mobile v. George Bailes Jr., (In the Matter of American Southern Publishing Company), 466 F.2d 160(5th Cir. 1970)(4 years).

4. Pub. L. No. 95-598, 92 Stat. 2549, 11 U.S.C. §§101-1501 (Supp. IV 1980).

5. The amendments were limited almost exclusively to down-grading bankruptcy judges and, contrary to the statement in many district court opinions, did not alter §§404 and 405, except as technical requirements to conform dates to the new transition period. The principal changes were;
   (a) §1471(a) and (b) were changed by substituting "district courts" for "bankruptcy courts"; (28 U.S.C. §1471 (a) and (b);
   (b) §1471(c) was added to transfer the exercise of the §1471(a) and (b) jurisdiction to bankruptcy courts; (28 U.S.C. §1471(c);
   (c) 1471(e) was added to give bankruptcy courts exclusive jurisdiction over all property of the debtor (28 U.S.C. §1471(e);
   (d) §153(a) was amended to eliminate good behavior and establish a 14 year term. This change also eliminated pensions for retired bankruptcy judges for service after April 1, 1984. (28 U.S.C. §153(a));
   (e) §407(b) was changed from a requirement to a recommendation that one third of the members of any committee of the Judicial Conference relating to bankruptcy administration and

one member of a committee relating to court administration be bankruptcy judges (28 U.S.C. §407(b));

(f) §407(c) was changed from requiring that all bankruptcy judges be invited to the annual circuit judicial conference to a minimum of one per district (28 U.S.C. §407(c));(there is not, and never was, a requirement that bankruptcy judges and their wives be invited to the circuit banquet and dance at the conclusion of the conference; practices on this vary from circuit to circuit and, from time to time, within circuits).

(g) §407(d) was deleted and §621(a)(2) amended, thus reducing the requirement that two bankruptcy judges serve on the Board of the Judicial Center to one (28 U.S.C. §621(a)(2));

(h) §405(a)(1) imposed limitations upon a bankruptcy judge's ability to issue injunctions and cite for contempt.

(i) §331 was amended by removing bankruptcy judges from membership on the Judical Conference;

(j) §293 was amended to preclude the assignment of a bankruptcy judge to sit temporarily on a court of appeals or district court;

(k) §610 was amended by deleting bankruptcy courts from the definition of courts;

(l) §456 was amended by deleting bankruptcy court as a court of which the official duty station was the District of Columbia.

6. An Act for the Relief of Insolvent Debtors in England, 1 Geo. 4, ch. 119(1820).

7. An Act to Establish a Court in Bankruptcy, 1 and 2 Will. 4, ch. 56 (1831).

8. An Act to Establish an Uniform System of Bankruptcy Throughout the United States, passed April 4, 1800, 2 Stat. 19; repealed December 19, 1803, 2 Stat. 248.

9. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466 (1939); Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935); Freeman v. Howe, 65 U.S. (24 How.) 450, 457 (1860).

10. The United States Constitution, Article I, §8, clause 4 states that "[t]he Congress shall have Power... To establish uniform Laws on the subject of Bankruptcies throughout the United States."

11. The United States Constitution, Article VI, paragraph 2 states that "[t]his constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land..."

12. White v. Sohloerb, 178 U.S. 542, 546 (1900).

13. Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

14. 102 S. Ct. 2858, 2876.

15. 11 U.S.C. §11a(7) (repealed by Pub.L. 95-598, title IV, §401(a), Nov. 6, 1978, 92 Stat. 2682), states:
> "...and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction."

16. Bankruptcy appellate jurisdiction was not provided for in the Judicial Code but was in the Bankruptcy Act §24 (28 U.S.C. §47) and Bankruptcy Rules 801-814. The Bankruptcy Rules have the force of a statute because they were authorized by Congress, adopted by the Supreme Court, and filed with Congress.

17. See note 8, supra.

18. An Act to Establish a Uniform System of Bankruptcy Throughout the United States, passed August 19, 1841, 5 Stat. 440, repealed March 3, 1843, 5 Stat. 614.

19. The Bankruptcy Act of 1867, passed March 2, 1867, ch. 176, 14 Stat. 517, repealed June 7, 1878, 20 Stat. 99.

20. The Bankruptcy Act of 1898, passed July 1, 1898, 30 Stat. 544, ch. 541, repealed November 8, 1978, Pub. L. 95-598.

21. Representatives of the Judicial Conference, the Administrative Office, and the Department of Justice were present at a November 10, 1982 hearing of the Subcommittee on Courts of the Senate at which Judge Richard L. Merrick testified and they had access to his prepared statement and answer to interrogatories in which he stated:
> Q. "What is the status of the interim rules..."
> A. "The rule" was adopted by the various judicial circuits late in September on the basis of a September 27 letter from the Administrative

Office of the United States Courts over the signature of William E. Foley, Director. At that time neither the circuit judges nor the district judges were aware that the two authorities which Mr. Foley gave as providing a juridical basis for "the Rule" were both mis-quotations.

The first authority cited by Mr. Foley was Rule 927 of the Rules of Bankruptcy Procedure, which he said provides that "each district court...may from time to time make and amend rules governing practice and procedure..." In fact the Rule provides that "each district court ...may from time to time make and amend rules governing practice and procedure...not inconsistent with these rules." (underscoring supplied).

The proposal of "the Rule" that the bankruptcy judges should act as special masters or referees is not consistent with the Rules of Bankruptcy Procedure, which contemplate that bankruptcy judges shall act in a judicial manner and shall issue final orders. Also "the Rule" is not "governing practice and procedure" but is establishing jurisdiction for the bankruptcy court. Most practioners feel that what the Congress can not do constitutionally by statute, the district courts can not do constitutionally by rule.

The second source of authority relied upon by Mr. Foley, and misquoted, is Section 105 of the Bankruptcy Code. Mr. Foley's letter states that "the attached rule (the Rule) is an interim measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The authority for this is found in Section 105...which gives courts of bankruptcy the power to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." (underscoring supplied).

Contrary to what Mr. Foley suggests, section 105 does not refer to "courts of bankruptcy", (i.e. district courts) but refers to "bankruptcy court," (i.e. bankruptcy court).

Sec. 105 (11 U.S.C. §105):

POWER OF COURT

(a) The bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the prcvisions of this title.

There is no way by which a bankruptcy court could issue an order which delegated to itself powers of the district court. It is contrary to the basics of

jurisprudence for a court to create its own jurisdiction.

Another position frequently taken by bankruptcy specialists is that "the Rule" is invalid because it is inconsistent with two of the Federal Rules of Civil Procedure, Rule 53(e)(2) and Rule 83. Because the Federal Rules have the force of a statute they cannot be controverted by local rules of district courts.

22. See note 21, supra.

23. Bankruptcy Rule 928

"These rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter."(Bankr. R. 928).

Civil Procedure Rule 83

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein..." (Fed. R. Civ. P. 82)

24. See Appendix II.

25. See note 21, supra.

26. "The Constitution, in distributing the powers of government, creates three distinct and separate departments-the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, Springer v. Philippine Islands, 277 U.S. 189,201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent

of the others-independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

27. 26 B.R. 1019(E.D. Mich. 1983).

28. See Appendix III.

29. See Merrick, Constitutional Chaos,2 Nor. Ill. L. Rev. 167, 172 (1982).

30. See note 21, supra.

31. See Appendix IV.

32. §1331 is the lineal descendant of "An Act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State Courts, and for other purposes", passed March 3, 1875, ch. 137, 18 Stat. L. 470. It is derived particularly from section 1, which provided in part, "that the circuit courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature... and arising under the Constitution or Laws of the United States..."

33. §1334 is derived from §§24 and 256 of "an Act To Codify, revise, and amend the laws relating to the judiciary, Pub. L. 475, passed March 3, 1911. As the title suggests it was a compilation of all of the powers of federal courts into the first Judicial Code. The sections enumerated above were a portion of a litany which established a mechanism of adjudication respecting the powers enumerated in Article I, Section 8 of the Constitution:

"§24. The district courts shall have original jurisdiction as follows:...Nineteenth. of all matters and proceedings in bankruptcy."
"§256. The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:... Sixth. of all matters and proceedings in bankruptcy."

Sixty-First Congress, Sess. III, chap. 231.

34. See note 32, supra.

35. "Congress carefully left in effect, until 1984, statutory provisions that give the federal district courts 'original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy.' 28 U.S.C. §1334." In re Northland Point Partners, 26 B.R. 1019, 1021(E.D. Mich.1983) (underscoring supplied).
"The fact that the old §1334 remains in force during the transition period is evidence of a Congressional intention to maintain district court jurisdiction over bankruptcy." Gerald W. Moody v. Hon. Robert D. Martin, No. 83-C-174-C, slip op. at 13(W.D. Wisc. March 7, 1983)(underscoring supplied).
"We do not interpret Congress' failure to repeal the old §1334 as an oversight... Congress purposefully chose not to eradicate the original jurisdiction historically residing in the district court. Intending to avoid precisely the situation created by Northern Pipeline, Congress left the district courts' jurisdiction over bankruptcy matters intact." White Motor Corporation v. Citibank, N.A., No. 82-3638, slip op. at 14(6th Cir. April 1, 1983).

36. §73. "Additional jurisdiction. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for relief of debtors; as provided in section 74, 75 and 77 of this Act." Act of March 3, 1933, 47 Stat. 1467.
§77A. "Additional jurisdiction. In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors as provided in section 77B of this Act." Act of June 7, 1934, 48 Stat. 911.

37. S. 2266 had been drafted to use an augmented §1334 as the jurisdictional vehicle, but the Senate format never played a prominent part in the legislative process. Various substantive views favored by the Senate became a part of the overall Reform Act, but the framework of H.R. 8200 was accepted by both houses at an early stage.

38. If the Senate bill (S. 2266) should have become the dominant bill rather than H.R. 8200, there would have been fewer last minute drafting changes if §1334 had not been eliminated by H.R. 8200. A base would have existed upon which the jurisdictional aspects of S. 2266 could stand.

39. "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the

> others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, siad that the independence of each department required that its proceedings "Should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. Humphrey's Executor v. United States, 295 U.S. 602,629-30(1935).

40. I watched the judge's mirror break,
It shattered all about him,
The rule he'd made for pride's own sake,
Caused everyone to doubt him.

Too late he seeks a second chance,
To prove himself a man to trust,
His reputation, at a glance,
Lies on the ground like talcum dust.

Anon.

41. See note 36, supra.

42. The Sixth Amendment to the United States Constitution states that "...all...judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution..."

Found among the papers of Thomas Jefferson was an aphorism attributed to Benjamin Franklin,
"Rebellion against tyranny is obedience to God."

43. Compare In re Color Craft Press Ltd. No. 81-M-03184,slip op. (Bankr. D. Utah, Feb. 7, 1983) with In re Color Craft Press, Ltd. No. 82-PM-0974, slip op.(C.D. Utah, Feb. 22, 1983).and compare In re Matlock Trailer Corp., 27 B.R. 311(Bankr. M.D. Tenn. Jan. 26, 1983) with In re Matlock Trailer Corp., 27 B.R. 318 (M.D. Tenn. Feb. 23, 1983).

APPENDIX I

December 23, 1982

HON. WALTER J. CUMMINGS, Chief Judge
HON. WILBUR F. PELL, JR., Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. JESSE E. ESCHBACH, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. CALE J. HOLDER, District Judge
HON. JOHN W. REYNOLDS, Chief District Judge
HON. JAMES L. FOREMAN, Chief District Judge
HON. BARBARA B. CRABB, Chief District Judge

O R D E R

Acting pursuant to the authority vested in the Judicial Council by 28 U.S.C. §332(d), the Judicial Council of the Seventh Circuit concludes that the uniform effective and expeditious administration of justice within this circuit requires that a rule substantially similar to the attached be adopted by the district courts of this circuit pursuant to 11 U.S.C. §105 for the administration of the bankruptcy system.

It is so ordered.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

GENERAL ORDER

By direction of the full Court met in Executive Session on Thursday, 16 December 1982, the following is adopted as a Rule of this Court:

A. RESOLUTION

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathone Pipe Line Co., _____ U.S. _____, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

B. FILING OF BANKRUPTCY PAPERS

The Court of Bankruptcy constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a jduge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

C. REFERENCE TO BANKRUPTCY JUDGES

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

D. POWERS OF BANKRUPTCY JUDGES

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(a) a proceeding to enjoin a court;

(b) a proceeding to punish a criminal contempt —

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(c) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(d) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (D) (3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3) (a) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(b) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

E. DISTRICT COURT REVIEW

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (E) (2) (a) and (b) of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (a) A district judge shall review:

(i) an order or judgment entered under paragraph (D) (2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (D) (2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (D) (3), whether or not any notice of appeal or application for leave to appeal has been filed.

(b) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (E) (2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

F. LOCAL RULES

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

G. BANKRUPTCY RULES AND TITLE IV OF PUBLIC LAW 95-598

Courts of bankruptcy and procedure in bankrupty shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ US. _____, 102 S. Ct. 2858 (1982).

H. EFFECTIVE DATE AND PENDING CASES

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

ENTER:

FOR THE COURT

Frank J. McGarr

Chief Judge

Dated at Chicago, Illinois, this 20th day of December 1982.

APPENDIX II A

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

December 3, 1982

MEMORANDUM TO ALL: Judges, U. S. Courts of Appeals
Judges, U. S. District Courts
Judges, U. S. Bankruptcy Courts
Clerks, U. S. District Courts
Clerks, U. S. Bankruptcy Courts

SUBJECT: Continued Operation of the Bankruptcy Court System after December 24, 1982, in the Absence of Congressional Action

On September 27, 1982, I transmitted by memorandum a model rule and sample order in accordance with the following September 23, 1982 Resolution of the Judicial Conference:

> RESOLVED:
>
> That the Conference request the Director to provide each circuit with a proposed rule to take effect October 5, 1982 in the absence of congressional action or extension of the stay, which rule will permit the bankruptcy system to continue without disruption in reliance upon jurisdictional grants remaining in the law as limited by Northern Pipeline Construction Co. v. Marathon Pipe Line Co. et al.

My September 27, 1982 transmission was, of course, designed to provide a "contingency approach," as specified in the Conference's Resolution, "in the absence of Congressional action or extension of the stay," then scheduled to expire on October 4. As you know, the Supreme Court, on October 4 extended the stay until December 24, because Congress was not able to act before recessing on October 2.

Congress reconvened on November 29, five days ago. While efforts to take action are now being made by the Congress, I believe prudence requires that I again provide "a proposed rule ... which ... will permit the bankruptcy system to continue without disruption" should Congress be unable to act -- or if the stay is not again extended -- by December 24.

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., et al., 102 S.Ct. 2858 (1982) the Supreme Court found that certain powers assigned to bankruptcy judges by the 1978 Bankruptcy Reform Act could be exercised constitutionally only by Article III judges, that language in the Act conferring unconstitutional authority could not be severed from language conferring other powers, and therefore provided the opportunity for Congress to correct the jurisdictional problem.

The Conference on September 10, 1982, advised Congress of its belief that the Supreme Court decision did not completely invalidate subsections (a) and (b) of section 1471 of Title 28, United States Code, as enacted in section 241(a) of the 1978 Act. In addition, sections 404 and 405 of that Act expressly vest bankruptcy powers in the district courts as "courts of bankruptcy" until April 1, 1984. The attached model rule has been formulated in reliance upon the remaining valid elements in the 1978 Act.

The attached model rule is intended to be an interim measure, by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The authority for that delegation is found in section 105 of the 1978 Act, which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to adopt "rules governing practice and procedure under the Act."

Under the model rule, all bankruptcy matters are initially referred to a bankruptcy judge. [Section b(1) of the Rule.] In proceedings not involving a final judgment on a Marathon claim, the bankruptcy judge may enter orders and judgments that become effective immediately, subject to district court review if requested by a party. [Section (c)(2).] With respect to final judgments in Marathon claims, the bankruptcy judge prepares recommended findings and conclusions and a proposed judgment. [Section (c)(3).] A district judge then reviews the recommendation and enters a judgment. [Section (c)(5).] Where the bankruptcy judge certifies that circumstances require, an order or judgment entered by a bankruptcy judge will be confirmed by a district judge even if no objection is filed.

The district court will provide expedited review or confirmation of any order, judgment, or proposed judgment where the bankruptcy judge certifies prompt review is necessary.

William E. Foley

Attachments: Model Rule
Sample Order

APPENDIX IIB

FEDERAL JUDGES ASSOCIATION
1355 Market Street - Suite 155
San Francisco, California 94103

Telephone
(415) 431-3190

January 14, 1983

TO: ALL MEMBERS OF THE FEDERAL JUDGES ASSOCIATION
and
OTHER INTERESTED FEDERAL JUDGES

FROM: Judge Spencer Williams, President

SUBJECT: A legislative solution to the bankruptcy problem

Request: Talk to your members of Congress during this legislative recess

1. FJA SUPPORTS JUDICIAL CONFERENCE OF UNITED STATES: In our last general mailing (October 18) we indicated that the board of directors of FJA had endorsed the Judicial Conference of the United States (Judicial Conference) position on the solution to the problems raised by Marathon Pipe Line and asked you to mention it to your friends in Congress. Since then, and particularly during the Special Session your board of directors and many other FJA members have been in contact with members of Congress, urging their support of this position. Since that session ended without passage of any remedial legislation, it is important that we continue, renew and expand our efforts. THERE IS EVERY INDICATION THAT MATTER WILL BE HIGH ON THE AGENDA FOR THE NEW CONGRESS*, AND IT IS THUS IMPERATIVE WE EACH DO OUR PART . . . NOW.

2. THE REQUEST: Congress will be in recess until January 25. This means that many members will spend at least part of this time in their home district making them more accessible to each of us. PLEASE CONTACT THEM THIS WEEK (if you can do so comfortably) AND DO TWO THINGS:

A.) Thank them for the 4% salary increase. This may be the first step in the reduction of tensions between Congress and the Judiciary, and we should express our appreciation.

B.) Tell them that the FJA - and most Federal judges - support the position taken by the Judicial Conference and the Chief Justice, (for the reasons set forth below), and ask them to contact you if, in the future, they have any questions or would like any further documentation.

- - - - - - - - - - - - -

*HR #3 (Rodino & Fish) was introduced on January 3. It provides for 127 Article III Bankruptcy Judges on annual salaries of $67,000.

3. THE PROBLEM . . . AND THE SOLUTIONS MOST FREQUENTLY DISCUSSED: (The following is an oversimplification, but should suffice pending receipt of a detailed package of material from Bill Weller later this month):

MARATHON PIPE LINE declared the Bankruptcy Reform Act of 1978 unconstitutional because it delegated to the bankruptcy judges jurisdiction over matters that should only be heard by Article III judges. The effective date of this decision was postponed until October 4 to give Congress time to act, and was extended to December 24. A subsequent request for a further extension was denied.

A number of bills were introduced to solve the problem. They run the gamut from the Rodino approach to the one supported by the Judicial Conference of the United States. Under Rodino all bankruptcy judges positions would be converted into modified Article III positions, with the incumbents being blanketed in until the President could fill the positions through standard Article III procedures. Under the Judicial Conference, the bankruptcy procedures would be fully integrated into the present Article III structure with all bankruptcy matters being filed in Federal District Court. Non-contested matters (over 60% of the current bankruptcy cases) would be handled by a non-judicial bankruptcy administrator, traditional bankruptcy contested matters (e.g., those contested matters that arose under the former bankruptcy act) would be handled by the magistrates, and Article III matters (those found in Marathon to be unconstitutionally delegated to the bankruptcy judges) would be assigned to United States District judges as are, any other federal cases over which they have jurisdiction.

Another plan was to appoint a number of Article III judges with a bankruptcy specialist "designation," and provide that they handle regular Article III matters if and when they were not otherwise busy on bankruptcy litigation.

Many arguments for and against these approaches bounced around. Some were political, some conceptual, some practical and some impractical. A few are repeated here without evaluation, and without indicating the actual or purported source.

For the Rodino Approach: It is a simple solution to a difficult problem. It gives the President 227 new Article III appointments (staggered over three years).

Against the Rodino Approach: It could be the first step in the fragmentation of the Federal Judiciary (if Article III Bankruptcy Specialists, why not Article III Tax Specialists, Article III Patent and Copyright Specialists? Article III Civil Rights Specialists? and the like?)* . . . it gives priority to Bankruptcy-related Article III matters

---

*Carried logically to its ultimate absurdity, why not create specialist Supreme Courts? Or designate specialist categories for three or four of the United States Supreme Court justices?

over all other Article III matters . . . it is overkill to process all bankruptcy matters through Article III judges, even modified Article III judges . . . it gives the President too many Article III appointments.

For the Judicial Conference approach: It is a good, clean, sensible solution the problem . . . it is less expensive (by $40 million) than the Rodino approach . . . it prevents fragmentation of the Federal Judiciary . . . it would carry a fee structure lower than Rodino giving a break to bankruptcy petitioners.

Against the Judicial Conference approach: There is no need to scrap the present system . . . it does not provide enough Article III appointments for the President . . . Article III judges do not want to handle bankruptcy matters.

4. THE BASIS OF FJA SUPPORT OF THE JUDICIAL CONFERENCE:

THE BOARD OF DIRECTORS OF FJA BELIEVES THAT ANYTHING THAT WOULD TEND TO FRAGMENT THE FEDERAL JUDICIARY WOULD BE ADVERSE TO THE MAINTENANCE OF THE STRONG, VIABLE, GENERALIST ARTICLE III JUDICIAL SYSTEM THAT HAS BEEN THIS NATION'S HISTORY SINCE ITS EARLIEST DAYS. IT IS THIS GENERALIST APPROACH THAT HAS ENABLED THE FEDERAL JUDICIARY TO BECOME ONE OF THE MOST, IF NOT THE MOST EFFECTIVE JUDICIAL SYSTEM IN THE WORLD.

In response to other comments about the basis for FJA's position: Article III judges are not reluctant to handle bankruptcy cases, and will handle them in the same, expeditious, conscientious manner in which they handle all other new matters that Congress from time to time adds to their judicial responsibilities.

Article III judges are not merely protecting turf by keeping the number of Article III positions to a minimum in order to prevent dilution of their 'status'. We welcome new positions whenever they are required to handle the additional workload arising from this, or any other added jurisdictional responsibility given us by Congress. Every year the new judicial statistics show heavier case loads and higher dispositions rates due, in large part, to new responsibilities placed upon us by Congress. We seldom resist new judgeships, in fact generally try hard to get them. Our position, plain and simple, is that this first step in fragmentation would have serious long-range effects on the Federal Judiciary, and that it is unwarranted particularly in view of the availability of a better solution.

CAVEAT: WE DO NOT MALIGN, OR CRITICIZE OTHER PRACTICAL OR POLITICAL CONSIDERATIONS HELD BY THOSE VESTED WITH THE POWER AND RESPONSIBILITY TO SOLVE THIS PROBLEM. WE HOPE, HOWEVER, THESE CONSIDERATIONS CAN BE ACCOMMODATED WITHOUT INFLICTING THE SERIOUS DAMAGE TO THE FEDERAL JUDICIAL SYSTEM WHICH WE FORESEE.

5. SPECIAL NOTE TO FJA MEMBERS: We have prepared, and will soon mail an update on our activities during the judicial salary considerations, our plans for supporting Judicial Survivors Annuity System (JSAS) legislation during the 98th Congress, other legislative matters we are following, and plans for a meeting in Washington during the Spring of 1983.

INCLUDED FOR YOUR INFORMATION IS A LIST OF THE THE MEMBERSHIP OF THE HOUSE AND SENATE JUDICIARY AND APPROPRIATIONS COMMITTEES. WHILE EVERY VOTE COUNTS, THESE ARE THE KEY PERSONS WITH WHOM WE MUST DEAL ON ANY LEGISLATION AFFECTING THE JUDICIARY.

MEMBERS OF SENATE JUDICIARY COMMITTEE

Judiciary

Judiciary

(Suite 2226, phone 41225, meets at the call of the chairman)

Strom Thurmond, of South Carolina.
Charles McC. Mathias, Jr., of Maryland.
Paul Laxalt, of Nevada.
Orrin G. Hatch, of Utah.
Robert Dole, of Kansas.
Alan K. Simpson, of Wyoming.
John P. East, of North Carolina.
Charles E. Grassley, of Iowa.
Jeremiah Denton, of Alabama.
Arlen Specter, of Pennsylvania.

Joseph R. Biden, Jr., of Delaware.
Edward M. Kennedy, of Massachusetts.
Robert C. Byrd, of West Virginia.
Howard M. Metzenbaum, of Ohio.
Dennis DeConcini, of Arizona.
Patrick J. Leahy, of Vermont.
Max Baucus, of Montana.
Howell Heflin, of Alabama.

MEMBERS OF HOUSE JUDICIARY COMMITTEE

Committee on Judiciary: Peter W. Rodino, Jr., New Jersey (chairman); Jack Brooks, Texas; Robert W. Kastenmeier, Wisconsin; Don Edwards, California; John Conyers, Jr., Michigan; John F. Seiberling, Ohio; Romano L. Mazzoli, Kentucky; William J. Hughes, New Jersey; Sam B. Hall, Jr., Texas; Mike Synar, Oklahoma; Patricia Schroeder, Colorado; Dan Glickman, Kansas; Harold Washington, Illinois; Barney Frank, Massachusetts; Geo. W. Crockett, Jr., Michigan; Charles E. Schumer, New York; Bruce A. Morrison, Connecticut; Edward F. Feighan, Ohio; Lawrence J. Smith, Florida; and Howard L. Berman, California.

Committee on the Judiciary: Hamilton Fish, Jr., New York; Carlos J. Moorhead, California; Henry J. Hyde, Illinois; Thomas N. Kindness, Ohio; Harold S. Sawyer, Michigan; Dan Lungren, California; F. James Sensenbrenner, Jr., Wisconsin; Bill McCollum, Florida; E. Clay Shaw, Jr., Florida; George W. Gekas, Pennsylvania; and Michael DeWine, Ohio.

CHAMBERS OF
IRVING R. KAUFMAN
U. S. CIRCUIT JUDGE
FOLEY SQUARE
NEW YORK, N. Y. 10007

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

APPENDIX IIC
July 26, 1982

TO: All Federal Judges

FROM: Committee on the Judicial Branch

As I indicated in my last communication, we have made significant strides on matters of importance to all federal judges. Now that the Committee has completed its summer meeting, I am pleased to report the following:

...

Finally, the Committee was of the view that the Supreme Court's recent decision in Northern Pipeline Co. v. Marathon Pipe Line, ___ U.S. ____ (June 18, 1982), creates significant problems involving the future of bankruptcy judges. It was suggested that Congress might elect to deem bankruptcy judges as Article III judges. Because of our firm commitment that such a step would be counterproductive, costly, and might undermine the independence of the present Article III judiciary, the Committee on the Judicial Branch, in conjunction with the Committees on Court Administration and Bankruptcy, is urging the United States Judicial Conference to adopt a resolution firmly opposing that part of H.R. 6109 which provides that bankruptcy judges would be appointed pursuant to Article III.

Our efforts on behalf of our colleagues continue undaunted.

Honorable Irving R. Kaufman,
Chairman
Honorable Arlin M. Adams
Leonard Garment, Esquire
Honorable Oren Harris
Honorable James Harvey
Honorable Irving Hill
Honorable Abner J. Mikva
William H. Mulligan, Esquire
Honorable J. Clifford Wallace

APPENDIX IID

NINETY-EIGHTH CONGRESS

PETER W. RODINO, JR., N.J., CHAIRMAN

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ASSOCIATE COUNSEL
FRANKLIN G. POLK

U.S. House of Representatives
Committee on the Judiciary
Washington, D.C. 20515
Telephone: 202-225-3951

March 7, 1983

Mr. William E. Foley
Director
Administrative Office of
the United States Courts
Washington, D.C. 20544

Dear Mr. Foley:

I am deeply concerned because we find upon review that the Judicial Conference's cost estimates for H.R. 3 (the Bankruptcy Judicial Conference's cost estimates for H.R. 3 (the Bankruptcy Court Act of 1983) submitted to the Judiciary Committee on February 21, 1983, are patently erroneous and totally unrelated to the legislation.

The cost estimates are based on increased expenditures for facilities, furniture and furnishings, and additional personnel, which are not required by H.R. 3. Specifically, the Judicial Conference's cost figures on H.R. 3 include the cost of additional law clerks and other support personnel, additional rental of space, tenant alterations, additional furniture and furnishings, and additional staff for the Administrative Office of the United States Courts. None of these items, however, are contained in or required by H.R. 3.

Incredibly, Table 3 of the Judicial Conference's February 21 cost estimates on H.R. 3 includes the cost of creating 304 bankruptcy judges, although the legislation specifically authorizes only 227 bankruptcy judgeships. Table 3 also states that 40 bankruptcy judges will be eligible for senior status and contains a $5.48 million first-year-after-enactment cost for "providing senior status for bankruptcy judges." This is completely incorrect. No bankruptcy judge will be eligible for senior status until he has served on the Article III court for at least 10 years (and reached the age of 70). Therefore, the earliest date that any bankruptcy judge would become eligible for senior status under H.R. 3 would be in 1994.

All currently sitting bankruptcy judges have courtrooms, furnishing clerks' office, and staffs. Hence, these costs are already being incurred, and passage of H.R. 3 will not change them. Bankruptcy judges

can continue to use their present facilities. In fact, some cost savings should be realized under H.R. 3 by the abolition of 14 part-time judgeships whose facilities will be no longer required. Nothing in H.R. 3 authorizes additional courtroom facilities or additional law clerks.

H.R. 3 simply leaves the present separate bankruptcy court in place and converts the existing 241 bankruptcy judge positions to 227 tenured positions, in order to comply with the requirements of Article III of the Constitution. Nothing in Article III, in the Northern Pipeline decision, or in the bill mandates anything further. No additional law clerks, two-story courtrooms, or other facilities are required. In fact, the Northern Pipeline decision expressly points out the contrary with respect to the requirements of Article III--so long as tenure during good behavior is provided and the level of salary is not diminished while a judge is in office, great flexibility exists with regard to all other matters.

The Congressional Budget Office, after their own independent review of the Administrative Office estimates and the legislation, estimates that the fiscal year 1983 cost impact of H.R. 3 would be approximately $.5 million. The fiscal year 1984 cost impact is estimated by CBO as approximately $3 million.

I am disturbed by the enormous disparity between the CBO estimate, our own estimate, and that put forth by the Administrative Office. I suppose I would be less disturbed except for the vigorous manner in which the Administrative Office budget estimates are being pushed as an argumen in opposition to the passage of this legislation and I would be less disturbed if the cost estimates set forth in your February 21 material bore some relation to the facts or the bill.

Sincerely,

Peter W. Rodino

PETER W. RODINO, JR.
Chairman

PWR:emw

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APPENDIX III

[illegible] OF
JOHN FEIKENS
[illegible] JUDGE

January 7, 1981

Chief Judges of United States
District Courts

Re: Bankruptcy Emergency Rule

Dear Chief Judge:

Judge Robert E. DeMascio of our Court, who is Chairman of the Judicial Conference Committee on Bankruptcy Administration, entered the enclosed Order today upholding the constitutionality of the Bankruptcy Emergency Rule. This might be helpful to you in your District. When Judge DeMascio's final Opinion is issued, we will send you a copy of that.

Very truly yours,

John Feikens
Chief Judge

v
enclosure

APPENDIX IV

During the thirty-nine months that the Reform Act was effective, ending December 31, 1982, there were 29 appeals to the District Court of the Northern District of Illinois which were not disposed of within a year of perfection of the appeal, spread among twelve judges.

Judge	Months	Disposition
A	30.25	decided
A	20	decided
A	17	pending
A	13.50	pending
A	13.50	decided
A	13.25	decided
B	20.75	decided
B	16.50	decided
B	14	decided
B	12.50	decided
B	12.50	pending
C	17	decided
C	15.50	decided
C	13.50	decided
C	12	decided
D	15	decided
D	12.50	decided
D	12.50	decided
E	13	decided
E	12.75	pending
F	12.50	decided
F	12	pending
G	33	pending
G	20	pending
H	26.75	pending
I	26	decided
J	19	decided
K	12.50	pending
L	13	pending

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No. 82-1623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE BRANIFF AIRWAYS, INCORPORATED, *et al.*,
Debtors.

AMERICAN AIRLINES, INC.,
Petitioner,

vs.

BRANIFF AIRWAYS, INCORPORATED, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT BRANIFF AIRWAYS, INCORPORATED IN OPPOSITION

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May 1983

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QUESTIONS PRESENTED

1. Whether *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), held that no federal court has jurisdiction to consider any bankruptcy matter?

2. Whether district courts may adopt local rules or make special references delegating certain authority to bankruptcy judges to perform clearly defined and limited tasks in bankruptcy cases?*

---

* Pursuant to Supreme Court Rule 28.1, Braniff Airways, Incorporated ("Braniff") states that the following are its parent companies, subsidiaries, and affiliates: BIC Guardian Services, Inc.; Braniff Airways, S.A.; Braniff Airways de Mexico, S.A.; Braniff Education Systems, Inc.; Braniff International Corporation; Braniff International Hotels, Inc.; Braniff Realty Company; Radio Aeronautica Paraguaya, S.A.; and Servicios Aeroporturios Aerosan, S.A.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT BRANIFF AIRWAYS, INCORPORATED IN OPPOSITION

OPINIONS BELOW

The decision of the Court of Appeals below has now been reported. *Braniff Airways, Inc.* v. *CAB*, 700 F.2d 214 (5th Cir. 1983) (per curiam).

STATEMENT OF THE CASE

On May 13, 1982, Braniff Airways, Incorporated ("Braniff") filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (the "Reform Act"), in the U.S. Bankruptcy Court for the Northern District of Texas, Fort

Worth Division.[1] Braniff has since been attempting to reorganize. Among the primary opponents of Braniff's efforts to reorganize have been a small number of competitor airlines which are also creditors. Petitioner American Airlines, Inc. ("American") has been prominent in this group.

On June 28, 1982 this Court decided *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), holding that the U.S. Bankruptcy Courts, as established by the Reform Act, had been vested with jurisdiction in excess of that permitted under Art. III of the Constitution. On December 25, 1982, after a stay of almost six months, this Court issued its mandate in *Northern Pipeline.*

To avert a complete collapse in the administration of the nation's bankruptcy laws, the Judicial Conference of the United States had earlier proposed an interim model rule to be adopted by the district courts. On December 21, 1982, the U.S. District Court for the Northern District of Texas promulgated such a rule (*see* Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings (the "Local Rule") (Pet. App. F at 28-33)), as did virtually every other district court in the nation (collectively, the "interim rules").

The interim rules proceed from the assumption that bankruptcy jurisdiction of the district courts—as distinguished from the bankruptcy courts—was unaffected by *Northern Pipeline* and that district courts have authority to refer bankruptcy-related matters to bankruptcy judges, subject to this Court's ruling in *Northern Pipeline.* The interim rules, of course, explicitly exclude *Northern Pipeline*-type proceedings from those matters upon which a bankruptcy judge may enter effective judgments or orders.

---

[1] When Braniff ceased operations on May 12, 1982, it was the eighth-largest trunk air carrier in the United States; it had approximately $750 million in assets and $1.2 to $1.8 billion in debts.

Under the interim rules, district courts throughout the country have successfully enlisted the aid of experienced bankruptcy judges in the uninterrupted administration of the bankruptcy laws. At the same time, Congress has been actively drafting a longer term solution to the Reform Act's constitutional deficiencies.[2] Thus, the interim rules have avoided a potentially catastrophic nationwide lapse in bankruptcy law and procedure and permitted the efficient allocation of federal judicial resources to bridge the temporary but critical gap in the Reform Act.

American's petition seeks review of a unanimous per curiam decision, issued on February 28, 1983 by the United States Court of Appeals for the Fifth Circuit, affirming the rulings by the District Court of the Northern District of Texas in two discrete proceedings within Braniff's Chapter 11 reorganization case. These jurisdictional rulings and their procedural background are described in American's petition. (*See* Pet. at 5-7.) Subsequent to the Court of Appeals per curiam ruling upholding district court bankruptcy jurisdiction and the Local Rule delegation, both of these proceedings were decided on the merits in favor or American.

1. *Braniff* v. *CAB.* On September 27, 1982, Braniff commenced an adversary proceeding in the bankruptcy

---

[2] American is wrong in its unsupported assertion that the promulgation of the interim rules "has lulled Congress into believing . . . there is no urgent need for it to enact a legislative remedy" to the jurisdictional defects in the Reform Act. (Pet. at 9-10.) To the contrary, the 98th Congress has been diligently working on bankruptcy reform legislation. Earlier this year, the Judiciary Committees in both the Senate and the House reported bills designed to repair these defects. *See* S. 1013 (S. Rep. No. 55, 98th Cong., 1st Sess. (1983)); H.R. 3 (H. Rep. No. 9, 98th Cong., 1st Sess. (1983)). On April 27, 1983, the Senate passed S. 1013 (129 Cong. Rec. S5364 (daily ed. April 27, 1983)), and H.R. 3 is now being deliberated by the House. There is therefore every likelihood that the jurisdictional defects identified in *Northern Pipeline* will be remedied in the near future.

court to enjoin the United States Civil Aeronautics Board ("CAB") from revoking Braniff's certificates to serve London and Venezuela from the Dallas/Fort Worth Airport and from awarding the London certificate permanently to American and the Venezuela route to Continental Airlines. Braniff contended the certificates were property of its estate and, as such, were within the protion afforded by Section 541 of the Reform Act. American, which had already been granted temporary authority to serve the London route in lieu of Braniff, intervened in the case on December 29, 1982. The trial in Braniff's suit against the CAB took place on February 16, 1983. On April 4, 1983, the bankruptcy court advised American, Braniff and other parties by letter of its decision "to deny the injunction requested by Braniff," noting that a memorandum decision setting forth the reasons for the denial would follow.

2. *The PSA Proceeding.* On January 14, 1983, the bankruptcy court commenced hearings on Braniff's application for approval of an agreement with Pacific Southwest Airlines ("PSA" and the "PSA Agreement") and related agreements among Braniff and its secured and unsecured creditors. Under the PSA Agreement, PSA agreed to form a new Texas Division to fly some 19 Braniff domestic routes using Braniff airplanes and equipment. American had been flying those routes without significant competition since Braniff's bankruptcy.

After a two-week trial, the bankruptcy court approved the PSA Agreement and the related agreements on February 1, 1983. On February 3-5, the district court conducted a *de novo* hearing on the merits of the PSA proceeding and, on February 18, entered an order upholding those agreements. On February 22, the Court of Appeals agreed to hear and on February 28 the Court of Appeals heard the specially expedited appeal on the merits of the PSA proceeding. Two days later, on March 2, 1983, the

Court of Appeals entered a final judgment reversing the district court's decision on the merits of the PSA proceeding, thus granting American the full relief it had sought.[3]

American now petitions for a writ of certiorari to review the Court of Appeals jurisdictional ruling arising from those proceedings.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is correct. It conflicts with no decision of this Court or any other Court of Appeals. For these reasons alone, the Court should deny the writ.

Furthermore, the interim solution developed by the courts for administering the bankruptcy system until Congress enacts reform legislation is functioning reasonably smoothly without violating congressional intent, Art. III, or the principles set forth in *Northern Pipeline*. In contrast, the alternative proposed by American would create immediate legal and economic chaos by bringing to an abrupt halt the 500,000 or more pending bankruptcy proceedings, involving billions of dollars in assets, and by prohibiting the commencement of any new proceedings until reform legislation is enacted by Congress. (*See* Pet. at 16-17.) As this Court explicitly recognized in staying its decision in *Northern Pipeline* and refusing to make it retroactive, the disruption of the nation's bankruptcy system "would surely visit substantial injustice and hardship." 102 S. Ct. at 2880. The interim rules were designed to prevent this eventuality.

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[3] On April 20, 1983, the Court of Appeals denied Braniff's request for *en banc* consideration of the merits of the PSA proceeding.

I. THE COURTS OF APPEALS HAVE UNANIMOUSLY UPHELD DISTRICT COURT BANKRUPTCY JURISDICTION AND THE LOCAL RULE DELEGATION

American states that the "questionable validity of the local rules . . . has created great uncertainty in the administration of the nation's bankruptcy laws." (Pet. at 9.) This statement is entirely wrong. In fact, few areas of federal law have generated such a consistent body of district court and appellate court decisions in such a short time.

In the few months that have transpired since the promulgation of the interim rules, the Fifth, Sixth and Eighth Circuit Courts of Appeals—the only circuits to consider these issues—have all concluded that district courts have bankruptcy jurisdiction under 28 U.S.C. §§ 1334 and 1471(a) and (b), and that the interim rules are constitutional and valid.

The Fifth Circuit's one-paragraph per curiam opinion in the present case affirmed the decision of the district court upholding jurisdiction "essentially for the reasons stated in its memorandum opinion." *Braniff Airways, Inc.* v. *CAB*, 700 F.2d 214, 215 (5th Cir. 1983) (per curiam) (Pet. App. A).

The district court, in turn, had fully discussed the issues American now raises in its petition. *Braniff Airways, Inc.* v. *CAB (In re Braniff)*, 10 Bankr. Ct. Dec. 30 (N.D. Texas 1983) (Pet. App. C at 5-17). The judge found that "[t]he difficulty [in *Northern Pipeline*] was *not* in separating § 1471(c) from § 1471(a) and (b), but in separating jurisdiction over . . . a case like *Marathon*, requiring an Art. III court, from the other appropriate jurisdiction of the bankruptcy court." *Id.* at 31 (Pet. App. C. at 8) (emphasis in original). He therefore determined that this Court "never intended to invalidate, nor did it invalidate 28 U.S.C. § 1471(a) and (b)." *Id.* Furthermore, he found that even if *Northern Pipeline*

had invalidated 28 U.S.C. § 1471(a) and (b), the district court nonetheless retained bankruptcy court jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1334. *Id.* at 31-32 (Pet. App. C at 8-10).

Turning to the propriety of the Local Rule, the District Judge stated that the district court was "not 'creating' anything, but is instead relying on and making use of an entire structure created by Congress, which will remain in existence through March 31, 1984, and which is already being used for the adjudication of cases filed before October 1, 1979." *Id.* at 32 (Pet. App. C at 11). He determined that the Local Rule was constitutional and was a fully authorized exercise of district court rulemaking authority under 11 U.S.C. § 105(a), 28 U.S.C. § 2071, Federal Rule of Civil Procedure 83, Bankruptcy Rule 927,[4] and the court's inherent equitable powers. *Id.* at 32-34 (Pet. App. C at 11-15).[5]

The Sixth Circuit's unanimous decision is the only Court of Appeals opinion of any length on the subject. *White Motor Corp.* v. *Citibank, N.A.*, No. 82-3638, slip op. (6th Cir. Apr. 1, 1983). In *White Motor*, the court rejected the "fatalistic analysis," *id.* at 11, advanced here by American and correctly pointed out that "the *Northern Pipeline* decision simply does not question the juris-

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[4] Judge Mahon specifically found that the Local Rule was not inconsistent with any Federal Rule of Civil Procedure or Bankruptcy Rule. *Id.* at 33 n.8 (Pet. App. C at 12 n.8).

[5] In addition, citing "exceptional circumstances" involved in the *In re Braniff* Chapter 11 case, Judge Mahon, pursuant to Section (c)(2) of the Local Rule, withdrew the automatic reference to the bankruptcy court and referred *In re Braniff* back to the bankruptcy court, pursuant to both the Local Rule and the inherent equitable authority of district courts to manage proceedings before them (the "Special Reference"). (Pet. App. B at 2-4; 10 Bankr. Ct. Dec. at 33-34; Pet. App. C at 14-17.) The Special Reference authorized the bankruptcy court to exercise powers and discharge functions identically as in the Local Rule "to the extent [the District] Court has jurisdiction." (Pet. App. B at 3.)

diction of the district courts." *Id.* The court went on to hold that district court jurisdiction exists over bankruptcy matters under 28 U.S.C. § 1471(a) and (b) as well as under 28 U.S.C. § 1334. *Id.* at 13-15.

The Sixth Circuit then concluded that the district courts "have both the authority to adopt the interim rule and the obligation to provide for the continuing orderly conduct of bankruptcy proceedings." *Id.* at 15. It found authority for the interim rules under the congressional mandate to the Judicial Conference of the United States, 28 U.S.C. § 331, *et seq.*, and under the general rulemaking authority of the district courts in 28 U.S.C. § 2071 (incorporated into the Federal Rules of Civil Procedure in Rule 83). *Id.* at 15-21. It found no conflict with congressional intent, with this Court's decision in *Northern Pipeline*, or with Art. III of the Constitution. *Id.* at 18.

In March 1983, the Eighth Circuit issued a unanimous per curiam decision to the same effect in *First National Bank of Tekamah* v. *Hansen*, No. 83-1158, slip op. (8th Cir. March 23, 1983) (per curiam).

Thus, three Circuit Courts of Appeals have unanimously rejected American's assertions here. This identity of holdings, coupled with the virtually unanimous rulings by the district courts that have addressed the question,[6]

---

[6] The only district court decision cited by American in support of its position was overruled *sub silentio* by the Sixth Circuit holding in *White Motor*. (*See* Pet. at 9 n.3) (citing *In re Matlock Trailer Corp.*, No. 382-02778, slip op. (M.D. Tenn. Feb. 23, 1983)). Every other district court decision to consider these issues has rejected American's position. *See, e.g., Q1 Corp.* v. *Reichenstein (In re Q1 Corp.)*, No. CV-83-0525, slip op. (E.D.N.Y. Mar. 22, 1983); *Moody* v. *Martin*, 27 B.R. 991 (W.D. Wis. 1983); *Otero Mills, Inc.* v. *Security Bank & Trust*, No. 82-373-M, slip op. (D.N.M. Feb. 28, 1983); *Prudential Insurance Co.* v. *Stouffer Corp. (In re Northland Point Partners)*, 26 B.R. 860, 9 Bankr. Ct. Dec. 1412; 26 B.R. 1019 (E.D. Mich. 1983); *Color Craft Press* v. *Nationwide Shopper Systems, Inc. (In re Color Craft Press)*, 10 Bankr. Ct. Dec. 182 (D. Utah

demonstrate that there is no division or confusion in the federal judiciary with respect to the issues raised in American's petition. Accordingly, there is no need for this Court to review the Fifth Circuit decision to provide consistency on these questions.

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT AND CONSISTENT WITH THIS COURT'S DECISION IN *NORTHERN PIPELINE*

A. District Courts Have Bankruptcy Jurisdiction

1. *Jurisdiction exists under 28 U.S.C. § 1471(a) and (b)*

American attempts to create a conflict between the Court of Appeals decision and this Court's ruling in *Northern Pipeline* by a strained, overly broad, and incorrect reading of *Northern Pipeline*. That decision invalidated the jurisdiction of the bankruptcy courts under the Reform Act on the basis that the bankruptcy courts could not constitutionally exercise the full power conferred on Art. III courts. But, as the Court of Appeals correctly ruled, *Northern Pipeline* did not invalidate the district courts' bankruptcy jurisdiction.

As stated by Justice Brennan's four-Justice plurality opinion, the sole issue presented in *Northern Pipeline* was "whether the assignment by Congress *to bankruptcy judges* of the jurisdiction granted in § 241(a) of the [Reform Act] violates Art. III of the Constitution." 102 S. Ct. at 2862 (emphasis added). The holding of the plurality opinion went no further; it held only that "the broad grant of jurisdiction *to the bankruptcy courts* contained in § 241(a) [at 28 U.S.C. § 1471(a)] is unconstitutional." 102 S. Ct. at 2880 (emphasis added).

1983). The decision in *Color Craft Press* was concurred in by all four district court judges in the District of Utah.

American's argument to the contrary is predicated exclusively on an erroneous interpretation of footnote 40 in the plurality opinion.[7] In footnote 40, the plurality stated that the grant of jurisdiction *to the bankruptcy courts* was not internally severable in light of the overall plan of the Reform Act, and replied to a suggestion by Chief Justice Burger, in dissent, that *Congress* could remedy the Art. III problem by routing to the district courts the kind of state law claims at issue in *Northern Pipeline* and by leaving intact the remaining jurisdiction of the bankruptcy courts. 102 S. Ct. at 2882. The plurality responded to the Chief Justice by saying that it was not for the Court to anticipate how Congress would redefine or reallocate *bankruptcy court* jurisdiction after the *North-*

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[7] Footnote 40 states in full:

"It is clear that, at the least, the new *bankruptcy judges* cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in *a single non-Art. III court*, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of *the bankruptcy court* over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H.R. Rep. No. 95-595, *supra*, pp. 43-48; S. Rep. No. 95-989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 2, that Congress' choice would be to have this case 'routed to the United States district court of which the bankruptcy court is an adjunct.' We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose." 102 S. Ct. at 2880 n.40 (emphasis added).

ern Pipeline holding.[8] The plurality's reference in the footnote is thus exclusively to the jurisdiction of the bankruptcy courts.[9]

Justice Rehnquist's two-Justice concurrence removes all doubt as to the reach of the *Northern Pipeline* holding. Justice Rehnquist agreed with the plurality's holding that the bankruptcy court could not constitutionally be granted jurisdiction of Northern Pipeline's common law action against Marathon. But he and Justice O'Connor were unwilling to decide any larger constitutional question on the jurisdiction of the bankruptcy courts, and did not even address the issue of the jurisdiction of the district courts. 102 S. Ct. at 2881. In stating his position on the appropriate order to be entered by this Court, Justice Rehnquist stated:

> "I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables *a Bankruptcy Court* to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority *to Bankruptcy Courts* under § 241(a), see [footnote 40], I concur in the judgment." 102 S. Ct. at 2882 (emphasis added).

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[8] Because the Chief Justice did not recommend and no party had requested that the Court remand the case to the jurisdiction of the district court for further proceedings, American's claim that this Court "declined to transfer [the case] to the civil docket of the district court" is without basis. (Pet. at 12; *see also id.* at 13.)

[9] This fact is made even more apparent by the references in footnote 40 to "Art. III constitutional challenge" and "conform-[ing] to the requirements of Art. III." As there can clearly be no Art. III infirmity with regard to the district courts, the footnote can logically apply only to bankruptcy courts.

This is precisely the analysis of *Northern Pipeline* followed in this case by the district court and affirmed by the Court of Appeals.[10]

Thus, it is clear that this Court in *Northern Pipeline* did not strip the district courts of the bankruptcy jurisdiction that Congress so clearly defined in 28 U.S.C. § 1471(a) and (b).

2. *Jurisdiction exists under 28 U.S.C. §§ 1334, 1331, and 1332*

Furthermore, the district court and Court of Appeals correctly determined that, even if *Northern Pipeline* could be read to strike down all district court bankruptcy jurisdiction granted in the Reform Act, the grant of jurisdiction to district courts in 28 U.S.C. § 1334 over summary bankruptcy matters continues, complemented by the court's federal question jurisdiction granted in 28 U.S.C. § 1331 and the diversity jurisdiction granted in 28 U.S.C. § 1332. Thus, whatever the effect of *Northern Pipeline* on the Reform Act jurisdiction, these jurisdictional provisions fully empower the district courts to hear and decide most bankruptcy-related matters, including those at issue here.

Section 1334 provides the district courts with "original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334. This encompasses the "summary jurisdiction"

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[10] In *White Motor, supra*, slip op. at 12, the Sixth Circuit reached the same conclusion as to the meaning of Justice Rehnquist's concurring opinion:

> "We do not believe that the concurring Justices intended to issue a broad declaration that the grant of jurisdiction in bankruptcy matters, which for two hundred years have been adjudicated under the auspices of the district courts, is unconstitutional, without ever referring directly to the district courts, to their historical role in the bankruptcy system, or to the various sources of their jurisdiction contained in the old and new Bankruptcy Acts."

of the old Bankruptcy Act and thus includes *Braniff* v. *CAB* and the PSA proceeding. *See Friedman* v. *Snelling*, 526 F.2d 1346, 1348 (1st Cir. 1975).[11]

Although the Reform Act amends Section 1334, it explicitly leaves the jurisdictional grant of the original Section 1334 in full force and effect until the end of the transition period on April 1, 1984. Reform Act § 402 (b).[12] American claims that Congress inadvertently forgot to repeal Section 1334, as currently codified, when it passed the Reform Act. (Pet. at 21-22.) This argument, however, is belied by the extraordinary care that Congress exercised in reformulating the bankruptcy law and its jurisdictional provisions. *See* Reform Act §§ 401-405. In any case, American cites no precedent for the proposition that a court may repeal a statute where Congress forgot to do so.[13] On the contrary, a statute

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[11] *Braniff* v. *CAB* was a dispute concerning property in the possession of Braniff's estate, and was therefore clearly a "summary" proceeding. Bankruptcy Act of 1898 § 111 (reorganization court has "exclusive jurisdiction of the debtor and its property, wherever located"). The PSA proceeding issues centered on the use, sale, or lease of Braniff assets and was therefore also "summary." *Id.* § 116(3) (district judge may authorize the lease or sale of "any property of the debtor"). American mischaracterizes the nature of the PSA proceeding in arguing to the contrary. (Pet. at 23 n. 20.) There was no adversary lawsuit on the question of Braniff's landing rights to render this aspect of the PSA proceeding "plenary." In any event, the PSA proceeding was clearly also within the district court's federal question jurisdiction. *See* fn. 17, *infra*.

[12] Section 402(b) of the Reform Act states that, subject to certain exceptions not relevant here, "the amendments made by Title II of this Act shall take effect on April 1, 1984."

[13] In *New York State Higher Education Services Corp.* v. *Adamo*, 619 F.2d 216 (2d Cir.), *cert. denied*, 449 U.S. 843 (1980), relied on by American (Pet. at 21-22), the court did the reverse. It cured an 11-month gap in the student loan nondischargeability provision by reading the prior law as *not* being repealed until the new law went into effect. But even that court relied in part on explicit congressional expression of its mistake and the subsequent enactment by Congress of corrective legislation. 619 F.2d at 219-22.

on the books and validly enacted must be given effect in accordance with its plain meaning. *See, e.g., Bread Political Action Committee* v. *Federal Election Commission*, 455 U.S. 577, 580-81 (1982).[14]

American's argument is defective in another respect. On the one hand, American argues that the grant of jurisdiction to district courts in 28 U.S.C. § 1471(a) and (b) makes Section 1334 unnecessary and evidences congressional intent to repeal it. However, American also argues that *Northern Pipeline* struck down Sections 1471(a) and (b). American cannot have it both ways. If Sections 1471(a) and (b) repealed Section 1334, then the invalidation of those sections by *Northern Pipeline* would automatically revive Section 1334. It is an "elementary rule of statutory construction . . . that a void act cannot operate to repeal a valid existing statute, and the law remains in full force and operation as if the repeal had never been attempted." *Weissinger* v. *Boswell*, 330 F. Supp. 615, 625 (M.D. Ala. 1971) (three-Judge Court per curiam) (quoting *Conlon* v. *Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935)). *See also Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515, 526 (1929); *Stewart* v. *Waller*, 404 F. Supp. 206, 215 (N.D. Miss. 1975) (three-Judge Court per curiam).

In addition, this Court long ago recognized that the federal bankruptcy laws may serve as a basis for federal question jurisdiction under 28 U.S.C. § 1331, which grants district courts original jurisdiction of "all civil actions arising under" the laws of the United States. *Hull* v. *Burr*, 234 U.S. 712, 720-22 (1914); *Lovell* v. *Newman & Son*, 227 U.S. 412, 423 (1913) (federal question jurisdiction exists where plaintiff relies "upon

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[14] American cites cases discussing the new Section 1334 before the release of the mandate in *Northern Pipeline*. (*See* Pet. at 22 n.19.) These cases do not even remotely address the question of the district courts' original jurisdiction under Section 1334.

any right specially conferred upon him under the Federal [Bankruptcy] statute"). *See also National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 611 (1949) (Rutledge, J., concurring) ("[F]ederal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional federal-question jurisdiction.").[15]

American argues that jurisdiction under 28 U.S.C. § 1331 over actions arising under the federal bankruptcy laws would render the jurisdictional provisions of the bankruptcy laws surplusage. (Pet. at 19-20.) American, however, wholly misconstrues the nature of Section 1331 and its relationship to specific grants of jurisdiction conferred in separate acts of Congress. Courts routinely find district court jurisdiction under both the general provisions of Section 1331 and more specific jurisdiction stat-

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[15] *Accord, Girardier* v. *Webster College*, 563 F.2d 1267, 1270 (8th Cir. 1977); *Handsome* v. *Rutgers University*, 445 F. Supp. 1362, 1364 (D.N.J. 1978).

Romero v. *International Terminal Operating Co.*, 358 U.S. 354 (1959), heavily relied on by American (Pet. at 20), lends support to this view. In finding that Section 1331 did not encompass maritime jurisdiction, Justice Frankfurter relied on the fact that federal question jurisdiction and maritime jurisdiction were each clearly derived from separate clauses of Art. III, Section 2, of the Constitution:

> "Certainly the accomplished lawyers who drafted the Act of 1875 [the predecessor to 28 U.S.C. § 1331] drew on the language of the constitutional grant on the assumption that they were dealing with a distinct class of cases, that the language incorporated in their enactment precluded 'identity' with any other class of cases contained in Article III." 358 U.S. at 366-67 (footnote omitted).

Bankruptcy jurisdiction, unlike admiralty and maritime jurisdiction, is not mentioned in Art. III. It is part of the constitutional grant of federal court "judicial power" only by virtue of its inclusion in Art. III's first clause—"arising under this Constitution [and] the Laws of the United States"—the same clause from which Section 1331 is derived.

utes. *See, e.g., Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 178-79 (1979) (lower court found subject matter jurisdiction under Section 1331 and three specific unrelated statutory grants of jurisdiction); *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 809 & n.15 (1976) (jurisdiction under 28 U.S.C. §§ 1331 and 1345).[16] Clearly, then, district court jurisdiction is on solid footing for any case which "arises under" the federal bankruptcy laws—such as *Braniff* v. *CAB* and the PSA proceeding.[17]

Furthermore, federal courts have adjudicated bankruptcy-related matters that might not otherwise have been cognizable in a federal forum where there was diversity of citizenship under 28 U.S.C. § 1332. *See, e.g., Hull* v. *Burr, supra*; *Lovell* v. *Newman & Son, supra*; *Bloor* v. *Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3570, at 472-73 (1975). That jurisdiction, of course, continues.

Accordingly, even if 28 U.S.C. § 1471(a) and (b) had never been enacted, the district courts would have

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[16] Courts have also found jurisdiction under Section 1331 to avoid difficult questions of jurisdiction under separate statutory provisions. *See, e.g., Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 340 n.4 (1977).

[17] All of the substantial and determinative issues in these proceedings were federal. *Braniff* v. *CAB* involved the application of Reform Act Sections 105 and 541 and the Federal Aviation Act, which governs the CAB's power to issue certificates authorizing airlines to serve certain routes. The PSA proceeding involved the application of the same Reform Act sections as well as Sections 362, 363, 365, 507, 1107, 1123, and others, and it too raised questions under the Federal Aviation Act. None of the courts below relied on state law in their decisions in either of these proceedings.

Moreover, if a bankruptcy-related matter is before the court on the basis of federal question jurisdiction, the doctrine of pendent jurisdiction will apply to grant the Court power to adjudicate additional state law matters. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

jurisdiction over most bankruptcy and related matters, including those at issue here, pursuant to 28 U.S.C. §§ 1331, 1332 and 1334 and the resulting pendent jurisdiction.[18]

B. The Court of Appeals Decision Upholding the Local Rule Is Correct and Consistent with *Northern Pipeline*

1. *The bankruptcy courts are in fact now adjuncts of the district courts*

There is no conflict between Art. III and the Local Rule. The *Northern Pipeline* plurality found that the new bankruptcy courts were "exercising powers far greater than those lodged in the adjuncts approved in" earlier Supreme Court cases, 102 S. Ct. at 2879; but the plurality acknowledged that district court "adjuncts" do comport with Art. III requirements "so long as those adjuncts [are] subject to sufficient control by an Art. III district court." *Id.* at 2875. The Local Rule passes constitutional muster and conforms to the principles enunciated by the plurality in *Northern Pipeline* precisely because it was carefully crafted to insure that the "essential attributes of judicial power" and the "ultimate decisionmaking authority" remain in the district court, not in the adjunct. 102 S. Ct. at 2874-76. It therefore fully complies with the constitutional standards

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[18] American argues that if the district courts do have bankruptcy jurisdiction, they alone must exercise it because Congress intended that bankruptcy jurisdiction be lodged in a single forum. (Pet. at 17.) Needless to say, American makes absolutely no showing that Congress would prefer the total cessation of bankruptcy jurisdiction or a crippling bankruptcy burden on the district courts (the choices American offers) to the delegation scheme adopted in the Local Rule. The Local Rule chooses as an interim solution the closest approximation of the congressional intent expressed in the Reform Act and prior bankruptcy law, utilizes the extensive resources of the bankruptcy courts that would otherwise be wasted during this interim period, and is fully consistent with this Court's judgment in *Northern Pipeline*.

enunciated in *United States* v. *Raddatz*, 447 U.S. 667 (1980).

Under the Local Rule, the bankruptcy courts are subject to comprehensive control by the district courts. Bankruptcy judges operate exclusively by reference from a district court and have no independent jurisdiction. The district court, on its own motion or on the motion of a party, may withdraw or limit the reference at any time. Local Rule § (c)(2).[19] Because the procedures are court-created, the district court may restructure, modify, or completely eliminate them at any time. Fed. R. Civ. P. 83.[20]

Moreover, only the district court may conduct bankruptcy jury trials,[21] and in any matter initially tried to

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[19] The *Northern Pipeline* plurality stated that perhaps the most significant change in the Reform Act was the new bankruptcy court independence, pointing out that under the old law "the district court retained control over the reference by his power to withdraw the case from the referee." 102 S. Ct. at 2876 n.31. Under the Local Rule, the district court clearly retains this control.

[20] This complete control by the Judicial Branch eliminates the underpinnings of at least a major portion of the Art. III concerns expressed in *Northern Pipeline*—the potential for control or manipulation of judicial officers by the Executive or Legislative Branches. These separation-of-powers concerns disappear where an adjunct's functions are established by and subject to the exclusive control of the judiciary, as under the Local Rule. As Justice Blackmun said in his concurring opinion in *United States* v. *Raddatz*, *supra*, justifying a judicial reference to a magistrate that was subject to much more limited judicial control than the Local Rule imposes on bankruptcy judges: "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." 447 U.S. at 685.

[21] The Local Rule removes the bankruptcy court's power, provided in the Reform Act, to conduct jury trials. Local Rule § (d)(1)(D). The *Northern Pipeline* plurality considered the power to conduct jury trials to be one of the attributes of judicial power. 102 S. Ct. at 2879.

the bankruptcy court there is an express right to a *de novo* district court determination.[22] There is no doubt, therefore, that the district court is the ultimate judicial decisionmaker.

In accordance with the plurality's analysis in *Northern Pipeline*, the Local Rule carefully distinguishes between those "core" matters that are central to the bankruptcy case and matters that are "related proceedings." Local Rule § (d)(2)-(3). Under the Local Rule, bankruptcy judges may enter effective orders and judgments only with respect to those matters on which they could have entered effective orders and judgments prior to the Reform Act. With respect to all other matters—including "civil proceedings that in the absence of a petition in bankruptcy, could have been brought in a district court or state court" and "claims brought by the estate against parties who have not filed claims against the estate," *id.* § (d)(3)(A)—bankruptcy judges may issue only *proposed* orders or judgments.

Entry of an effective judgment or order by a bankruptcy judge on the types of matters permitted under the Local Rule is proper. All nine Justices in *Northern Pipeline* recognized that Congress may create legislative courts or adjuncts to adjudicate congressionally created or "public" rights. 102 S. Ct. at 2869-71, 2874-78 (Brennan, J.), 2882 (Rehnquist, J.), 2883 (White, J.). The plurality gave as an example disputes involving certifi-

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[22] An important aspect of district court control discussed in *Northern Pipeline* was the scope of review. The plurality noted that in *Crowell* v. *Benson*, 285 U.S. 22 (1932), the agency's orders were to be set aside if "not supported by the evidence," while under the Reform Act the bankruptcy court's findings were subject to review only on the more deferential "clearly erroneous" standard. 102 S. Ct. at 2879. The Local Rule, however, provides for a *de novo* determination by the district court. Local Rule § (e)(2)(B). Such a scope of review was expressly approved in *Raddatz*, *supra*, 447 U.S. at 680.

cates and licenses. *Id.* at 2871. This would include, for example, the certificates at issue in *Braniff* v. *CAB*. The plurality also recognized the use of legislative courts to adjudicate "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." 102 S. Ct. at 2871. Such matters, of course, include the bankruptcy court's consideration of the PSA Agreement and the related agreements with Braniff's creditors, all of which the Court of Appeals found related to the restructuring of debtor-creditor relations.[23]

2. *The Local Rule was properly promulgated*

Not only is the Local Rule in accord with congressional intent, *Northern Pipeline*, and Art. III, it is also a fully authorized exercise of judicial control over the administration of court business. On December 17, 1982, the Judicial Council of the Fifth Circuit, acting pursuant to 28 U.S.C. § 332, submitted the interim rule to the district courts of the Fifth Circuit. The Judicial Councils have statutory authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuits," 28 U.S.C. § 332(d)(1), and therefore have full rulemaking powers.[24]

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[23] Such "public rights" matters are typically presented to administrative agencies, and without doubt such agencies may enter effective and final orders and judgments. *See* Administrative Procedure Act, 5 U.S.C. § 704 ("final agency action" subject to judicial review); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (administrative decisions terminating Social Security benefits are "final decisions" and may be implemented before district court review). In matters arising from congressionally created rights, *Northern Pipeline* establishes no constitutional distinction between the entry of orders or judgments by administrative agencies and their entry by bankruptcy judges.

[24] Justice Harlan stated that:

> "Within the framework of the statutes establishing the inferior federal courts and defining their jurisdiction, the Judicial Councils are charged with the duty to take such actions as are necessary for the expedition of the business of the courts in

Several courts have already upheld the validity of interim rules on the basis that they were adopted pursuant to the recommendation or order of the relevant Judicial Council. *See White Motor Corp.* v. *Citibank, N.A., supra; Q1 Corp* v. *Reichenstein (In re Q1 Corp.)*, No. CV-83-0525, slip op. (E.D.N.Y., Mar. 22, 1983); *Prudential Insurance Co.* v. *Stouffer Corp. (In re Northland Point Partners)*, 26 B.R. 1019 (E.D. Mich. 1983). As stated in *Prudential Insurance*: "It is clear that the council's obligation to assure the 'effective and expeditious administration of justice within this circuit' would have been ill-served if there had been no response to the Supreme Court's refusal to extend the stay in *Marathon*." *Id.* at 1021.

Furthermore, the local rulemaking authority contained in Federal Rule 83 [25] and in the equivalent Bankruptcy Rule 927 [26] embraces important matters of court procedure and also authorizes the Local Rule. In *Colgrove* v. *Battin*, 413 U.S. 149 (1973), this Court upheld a local rule authorizing six-person juries in civil cases over the objection that the rule violated the Seventh Amendment and was inconsistent with the assumption in Federal

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each circuit." *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 108 (1970) (Harlan, J., concurring).

[25] The local rulemaking authority is set forth in the first sentence of Rule 83:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."

[26] Bankruptcy Rule 927 is very similar to Rule 83 and provides the same authority to a district court in bankruptcy proceedings that Rule 83 provides to the district court generally. *See* Rule of Bankruptcy Procedure 927, advisory committee note ("This rule is an adaptation of Rule 83 . . . ."). The district court below relied on both provisions in upholding the Local Rule. (Pet. App. C at 11-12.)

Rule 48 that twelve-person juries are required unless the parties stipulate otherwise. *Id.* at 152-160, 163-64 & n.23. In *Franquez* v. *United States*, 604 F.2d 1239 (9th Cir. 1979), the Ninth Circuit upheld a district court order granting a jury trial in a suit by Guam landowners to recover fair compensation for land taken from them by the United States, even though the plaintiffs had no constitutional or statutory right to a jury trial.

American relies for its contrary view on *Miner* v. *Atlass*, 363 U.S. 641 (1960), which struck down a local rule providing for depositions in admiralty cases. But this Court in its subsequent decision in *Colgrove* v. *Battin*, *supra*, found no inconsistency with *Miner* and explained that local rules are sustainable if they do not contain aspects "which bear upon the ultimate outcome of the litigation and thus . . . 'may be of as great importance to litigants as many a "substantive" doctrine . . . .'" 413 U.S. at 163 n.23 (citation omitted). Here, the Local Rule does not affect the ultimate outcome of bankruptcy litigation or expand or alter the basic rules of bankruptcy proceedings and litigation.[27] Instead, it delegates limited authority to a bankruptcy judge to hear bankruptcy cases, subject to preexisting bankruptcy litigation rules[28] and subject to a *de novo* determination

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[27] Nor, of course, does the Local Rule expand the jurisdiction of the district courts. *See Q1 Corp.* v. *Reichenstein*, *supra*. Federal Rule 82 and the cases cited by American for the proposition that federal court jurisdiction may not be enlarged by rulemaking (Pet. at 25 n.25) are therefore not relevant.

[28] Paragraph (g) of the Local Rule provides that:

"Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. § 2075 and limited by SEC 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the hold-

by the district court. The Local Rule is, in fact, a less "substantive" innovation than the reduction in jury size upheld in *Colgrove v. Battin*, *supra*, or the creation of a right to a jury trial in *Franquez* v. *United States*, *supra*.[29]

American contends that Rule 53 is the exclusive authority for references of this kind by a district court. But Rule 53 is a specialized reference device that is used most often to refer narrow, highly technical factual or accounting issues to experts for initial resolution. This explains why the findings of a master must be sustained unless "clearly erroneous." Fed. R. Civ. P. 53(e)(2).[30] Furthermore, Rule 53 does not "occupy the field" of judicial references. This is clear from the enactment in 1968 of the Federal Magistrates Act, 28 U.S.C. §§ 631, *et seq.*, which unquestionably provides for judicial reference outside the scope of, and under standards different from, Rule 53.[31] Since American's premise is plainly

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ing of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982)."

[29] *Kimbrough* v. *Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979), supports this view. The court there upheld the validity of an experimental local rule, adopted by several district courts at the Justice Department's request, mandating a compulsory arbitration system in certain classes of cases where the remedy sought was money damages of $50,000 or less. Finding that the local rule did not exceed Rule 83 authority, the court emphasized that the rule was promulgated "for a limited time period" and was ultimately intended "to benefit the entire federal judicial system." *Id.* at 574.

[30] *See* Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 795 & n.106 (1975). The great deference given to a master's findings also leads logically to the "exceptional condition" requirement for appointing a master in a nonjury action. Fed. R. Civ. P. 53(b). 88 Harv. L. Rev., *supra*, at 798 n.130.

[31] A magistrate may act as a special master, *id.* § 636(b)(2), but this Court has stated that, under the Act, "not every reference, for whatever purpose, is to be characterized as a reference to a special master." *Mathews* v. *Weber*, 423 U.S. 261, 273 (1976).

wrong,[32] *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), relied on by American, is simply not applicable.[33]

Finally, this Court has long recognized a district court's "inherent power to provide [itself] with appropriate instruments required for the performance of [its] duties." *In re Peterson*, 253 U.S. 300, 312 (1920) (Brandeis, J.). The last sentence of Rule 83 reflects this principle[34] by providing: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." The courts have frequently affirmed this inherent authority. *Ruiz* v. *Estelle*, 679 F.2d 1115 (5th Cir. 1982); *Franquez* v. *United States*, *supra*.[35] The district court's exercise of this inherent authority was certainly proper in this case.

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[32] American relies for its premise on language from *Arthur Murray, Inc.* v. *Oliver*, 364 F.2d 28 (8th Cir. 1966), where the district court expressly appointed a special master in circumstances the Eighth Circuit found to be inappropriate. (Pet. at 25.) *Arthur Murray* stands only for the proposition that if a court appoints a special master under Rule 53, it must adhere to Rule 53's requirements.

[33] (*See* Pet. at 25-26.) *La Buy* merely confirmed the requirement in Rule 53(b) that "some exceptional condition" must be present for a district court to appoint a master in a nonjury proceeding. Although Rule 53 has not been invoked here, the requirement of Rule 53(b) would certainly have been satisfied by the fact that the district court expressly found several "exceptional circumstances" when it adopted the Local Rule, *see* Local Rule § (a), and the district judge below made similar findings with respect to the particular case of *In re Braniff* in making the Special Reference. (Pet. App. B at 2-3; Pet. App. C at 15-17.)

[34] *See* 12 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3155 (1973).

[35] *See also Schwimmer* v. *United States*, 232 F.2d 855, 865 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) ("Beyond the provisions of Rule 53 . . . for appointing and making references to Masters, a Federal district court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'") (quoting *Peterson, supra*).

Thus, the Court of Appeals correctly ruled that the Local Rule was a constitutional exercise of established judicial authority.

CONCLUSION

For the foregoing reasons, this Court should deny American's Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1982

IN RE BRANIFF AIRWAYS, INCORPORATED, *et al.*,

Debtors.

AMERICAN AIRLINES, INC.,

Petitioner,

vs.

BRANIFF AIRWAYS, INCORPORATED, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER, AMERICAN AIRLINES, INC.

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No. 82-1623

IN THE

Supreme Court of the United States

October Term, 1982

IN RE BRANIFF AIRWAYS, INCORPORATED, *et al.*,

Debtors.

AMERICAN AIRLINES, INC.,

Petitioner,

vs.

BRANIFF AIRWAYS, INCORPORATED, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER, AMERICAN AIRLINES, INC.

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

Braniff Airways, Incorporated ("Braniff") argues in its Brief In Opposition (the "Braniff Brief") that the issues presented by this case are not important questions of federal law which should be decided by this Court. In support, Braniff argues that Courts of Appeals for the Fifth, Sixth and Eighth Circuits have each concluded that the district courts have bankruptcy jurisdiction under 28 U.S.C. §§ 1334 and 1471(a) and (b) and that the local rules promulgated in the wake of entry of the judgment in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982) (collectively, the "local rules") are constitutional and valid. Braniff asserts that as a result of these three decisions, no uncertainty exists with respect to the constitutionality of the Local Rule of the Northern District of Texas Concerning Bankruptcy Cases and Proceedings (the "Local Rule") and the existence of district court jurisdiction over bankruptcy matters.

Braniff's argument overlooks the almost daily challenges to bankruptcy court jurisdiction, which challenges will continue to be brought until the questions presented in this case are resolved by this Court. Even now, notwithstanding three Courts of Appeals decisions to the contrary, courts continue to hold that no district court jurisdiction over bankruptcy matters exists and that the local rules are invalid. *See, e.g., In re Wildman*, No. 81-B-5869 (Bankr. N.D. Ill. May 6, 1983).[1] It is imperative that this Court definitively resolve the uncertainty as to the existence of district court

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[1] *In re Wildman* has been lodged with this Court contemporaneously herewith. The opinion is an excessively caustic attack on the local rules, the Judicial Conference of the United States, and the courts which have so far upheld the local rules. The vehemence of Bankruptcy Judge Merrick's attack on the local rules itself demonstrates the necessity of this Court resolving the constitutionality of the local rules.

bankruptcy jurisdiction and the constitutionality of the current system of administration of over 500,000 pending bankruptcy cases involving billions of dollars.[2]

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *MARATHON*.

A. The District Courts Have No Jurisdiction Under 28 U.S.C. §§ 1471(a) and (b).

Braniff argues that *Marathon* did not invalidate any grant of bankruptcy jurisdiction to the district courts because *Marathon* addressed only the jurisdictional grant to the bankruptcy courts under the Bankruptcy Reform Act of 1978 (the "Bankruptcy Reform Act"). Braniff emphasizes the lack of reference in the plurality and concurring opinions to the existence or non-existence of district court jurisdiction over bankruptcy matters. The reason for the total absence of discussion of district court jurisdiction in *Marathon* is the recognition by this Court that Sections 1471(a) and (b) of Title 28 of the United States Code (the "Judicial Code") only serve as the first step in a two-step process of vesting exclusive trial court jurisdiction in the bankruptcy court. The legislative history explains the reason for the adoption of this artificial two-step approach of vesting exclusive jurisdiction in the bankruptcy court:

> (1) The presently established U.S. District Courts can serve as Article III repositories for the broadened jurisdiction

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[2]The uncertainty of the validity of bankruptcy court orders under the local rules hampers the administration of bankruptcy cases in many respects. For example, purchasers of a bankrupt's assets cannot be assured of clear title, lenders to trustees and debtors-in-possession cannot be assured of lien priority and proponents of plans of reorganization cannot be confident that the confirmation of a plan is binding upon all parties. Each impediment tends to depress interest in and therefore the value to be preserved by the bankruptcy process. Moreover, at least one bankruptcy judge has been sued personally on the grounds that the judge deprived the plaintiff of property without due process of law because the judge had no power to act under the respective local rule. *Cameron v. Real*, No. 83-0187 (RG) (C.D. Cal.).

essential to efficient judicial administration of bankruptcy cases.

(2) The expanded jurisdiction vested in the U.S. District Courts may be delegated by statute for exercise exclusively by bankruptcy judges, subject always to review, as under present law, by the district courts. Certain perceived constitutional impediments to the exercise of the judicial power of the United States by non-tenured judges are thus eliminated.

(3) The dislocations associated with the continued evolution of the present referee system into a functionally independent adjunct of the district court are minimal in comparison to those attendant upon the establishment of separate bankruptcy court system.

(4) The fragmentation of the federal court jurisdiction envisioned by some is thus avoided.

(5) The convenience and economy of District Court appeals are preserved.

S.Rep. No. 989, 95th Cong., 2d Sess. 16 (1978).

This Court recognized that the apparent jurisdictional grant to the district courts contained in §§ 1471(a) and (b) was in fact part of a unitary and non-severable grant of jurisdiction to be exercised exclusively by the bankruptcy courts. This "facade of a grant to the district courts", *Marathon*, 102 S.Ct. at 2879, cannot now be artificially severed from § 1471(c) and transformed into something Congress manifestly never intended it to be under any circumstances: an independent grant of jurisdiction over bankruptcy cases and proceedings to the district courts.[3] Accordingly, Braniff's argument that *Marathon* did not strip the district courts of bankruptcy jurisdiction ignores the entire legislative history of the Bankruptcy Reform Act and ignores this Court's holding that the jurisdictional provisions of § 241(a) of the Bankruptcy Reform Act, enacting §§ 1471(a), (b), and (c)

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[3]*See Wildman*, slip op. at 37-39, 45-48, 70-71. The House Report accompanying the House Bill, H.R. 8200, identifies several reasons why Congress believed that vesting trial court jurisdiction in the existing district courts was an unacceptable alternative to creating a new bankruptcy court system. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 14-15 (1977).

of the Judicial Code, constituted a unitary and non-severable grant of bankruptcy jurisdiction to one single court — the bankruptcy court.

B. The Local Rule Is Unconstitutional.

Braniff asserts that under the Local Rule the "essential attributes of judicial power" and the "ultimate decisionmaking authority" remain in the district court. Braniff's support for this assertion is a recitation of the provision of the Local Rule providing for *de novo* review by district court of the findings and conclusions of the bankruptcy judge. Braniff ignores the fact that in "core" proceedings under the Local Rule bankruptcy judges enter final orders and judgments which become enforceable upon entry, unless stayed pending appeal. It is difficult to conceive of a result which would be more in conflict with the *Marathon* decision.

Braniff argues that entry of final orders by bankruptcy judges in core proceedings is proper because core proceedings only involve the restructuring of debtor-creditor relations, which this Court in *Marathon* purportedly recognized as being the proper subject of adjudication by legislative courts. Braniff further argues that the Bankruptcy Court's consideration of the PSA agreement and related agreements involved only the restructuring of debtor-creditor relations. However, *Marathon* did not hold that all proceedings involving the restructuring of debtor-creditor relations could constitutionally be adjudicated by an Article I judge. The plurality in *Marathon* declared only that the core of bankruptcy power — the restructuring of debtor-creditor relations — *may* be a public right.[4] Although the plurality provided no further guidance on what part of the bankruptcy power may involve "public rights", the private and state-created rights at issue in the PSA Proceeding and the CAB Proceeding surely did not involve the adjudication of public rights only.

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[4]The plurality's discussion was in the narrow context of a discussion of whether a discharge in bankruptcy is a public right. 102 S.Ct. at 2871.

C. The Decision Below Ignores the Mandate of *Marathon* That Only Congress May Remedy the Present Jurisdictional Void.

The Court of Appeals and Braniff have ignored Justice Brennan's constitutionally mandated declaration that "it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978". 102 S.Ct. at 2880 n. 40. The courts below found that the potential disruption of the nation's bankruptcy system empowers the lower courts to step in notwithstanding the unequivocal declaration of this Court that it is improper for the judiciary to do so. Expediency can never justify any court ignoring the fundamental principle of separation of powers so often recognized by this Court.[5]

Justice Brennan in the plurality opinion noted:

> [W]e cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structures intact with respect to other types of claims and thus subject to Article III constitutional challenge on a claim-by-claim basis.

102 S.Ct. at 2880 n. 40.

Braniff argues that this Court should allow the lower courts to ignore the principle of separation of powers and to judicially legislate a new bankruptcy court system simply because Congress might prefer a temporary unconstitutional judicial remedy while

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[5]By leaving to Congress the exclusive responsibility for enacting a legislative solution to the jurisdictional void created by *Marathon*, this Court recognized that the judicial power of the United States is:

> Dependent for its distribution and organization, and for the modes of its exercise entirely upon the action of Congress, who possess the sole power of creating tribunals inferior to the Supreme Court . . . and of investing them with jurisdiction . . . in the exact degrees and character which to Congress may seem proper for the public good.

Palmore v. United States, 411 U.S. 389, 401 (1973). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933).

it considers remedial legislation. Nothing, including a temporary disruption of the bankruptcy court system,[6] can justify usurpation of the exclusive authority of Congress to determine the manner of restructuring the jurisdictional provisions of the bankruptcy laws.

III.
THE DISTRICT COURT IS WITHOUT JURISDICTION OVER BANKRUPTCY CASES.

According to Braniff, Sections 1331, 1332 and 1334 of the Judicial Code currently grant to the district courts jurisdiction to hear "most bankruptcy and related matters." (Braniff Brief at 17). Braniff concedes that the jurisdiction created by these sections is not co-extensive with that granted under 28 U.S.C. §§ 1471(a) and (b). Thus, even if Braniff is correct that district court jurisdiction over bankruptcy matters subsists by virtue of these three sections, direction is needed from this Court in order to determine the boundaries of any continuing bankruptcy

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[6]Presumably Congress would promptly act to legislate a remedy to the existing jurisdictional void if this Court were to rule in favor of Petitioner herein. Moreover, the resulting legislation would be less likely to be of questionable constitutional validity than that currently being considered by Congress. Many of the infirmities contained in the Local Rule are replicated in S. 1013, which the Senate passed on April 27, 1983. 129 Cong. Rec. S 5384 (daily ed. April 27, 1983). *See* S.Rep. No. 55, 98th Cong., 1st Sess. 14, 42 (1983) (S. 1013 shares many similarities with the interim rule under which district courts and bankruptcy courts have been operating since entry of the *Marathon* judgment). The Senate Report accompanying S. 1013 states that the "*Marathon* decision is a confusing one to most observers" and that *Marathon's* "scope is a matter of widespread disagreement". *Id.* at 2, 8. Later the Senate Report states that the *Marathon* decision is subject to varying interpretations and that "the required legislative response to *Marathon* may be viewed in a widely disparate manner by different observers". *Id.* at 32. The Senate Report also shows that the Senate has relied on the decision below in its determination that S. 1013 is an appropriate and constitutional legislative remedy to the void created by *Marathon*. *See id.* at 2, 41. Given the cloud under which S. 1013 is being considered, it is a virtual certainty that, absent review of this case by this Court, should S. 1013 become law it will be subject to constitutional challenge. *See Wildman*, slip op. at 73.

jurisdiction.

Petitioner, contrary to the assertions of Braniff, does not claim that old § 1334 was not repealed and that this Court may repeal a statute where Congress has neglected to do so. Old Section 1334 was effectively repealed by virtue of Congress enacting: (i) Sections 238 and 405(c)(2) of the Bankruptcy Reform Act, which operate to render the district court an appellate court under new Section 1334 effective October 1, 1979; and (ii) Sections 241(a), 404(a) and 405(a)(1) which together vest trial court jurisdiction, effective October 1, 1979, solely in the bankruptcy court. There is not an iota of support in the legislative history of the Bankruptcy Reform Act for the anomalous proposition asserted by Braniff that Congress intended to leave old Section 1334 effective alongside the inherently inconsistent jurisdictional provisions presently effective under the Bankruptcy Reform Act.

In addition, Braniff claims that this Court has recognized that the federal bankruptcy laws may serve as a basis for federal question jurisdiction under § 1331 of the Judicial Code, which grants district courts original jurisdiction of "all civil actions arising under" the laws of the United States. No case cited by Braniff held that a district court has jurisdiction over a bankruptcy case as part of its federal question jurisdiction.[7]

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[7]*Lovell v. Newman*, 227 U.S. 412 (1913), rather than finding federal question jurisdiction included bankruptcy matters, held that no basis of jurisdiction existed over an action brought by a trustee in bankruptcy. *Hull v. Burr*, 234 U.S. 712 (1914), concerned a collateral attack of bankruptcy proceedings in which the plaintiff had insisted that the bankruptcy proceedings were void for want of jurisdiction. The Court there expressly stated that it had not considered whether the action had arisen under the laws of the United States. 234 U.S. at 720-21.

The language Braniff quotes from *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 611 (1949) (Rutledge, J., concurring) as support for its argument concerned the scope of the federal question clause of Article III, § 2, not the scope of 28 U.S.C. § 1331.

The two other cases relied upon by Braniff involve whether a college may refuse to release transcripts to students whose student's loans have been discharged in prior bankruptcy proceedings. In no sense did the actions involve bankruptcy matters or proceedings or otherwise arise in the context of an existing bankruptcy case. *See Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977); *Handsome v. Rutgers University*, 445 F.Supp. 1362 (D.N.J. 1974).

Braniff also points to the diversity of citizenship jurisdiction under Section 1332 as a third source of jurisdiction which, when combined with Sections 1331 and 1334 purportedly gives the district courts jurisdiction over "most" bankruptcy and related matters. The jurisdiction granted under Section 1332 is not co-extensive with the jurisdiction over civil proceedings "related to cases under Title 11" granted under Section 1471(b) since diversity of citizenship jurisdiction requires not only an amount in controversy exceeding $10,000.00, but also complete diversity between all plaintiffs and all defendants.[8]

IV.

THE DISTRICT COURT WAS WITHOUT AUTHORITY TO PROMULGATE THE LOCAL RULE OR ORDER THE SPECIFIC REFERENCE.

As authority for the promulgation of the Local Rule, Braniff cites 28 U.S.C. § 332(d)(1).[9] Neither the District Court nor the Court of Appeals relied upon the recommendation of the Fifth Circuit Judicial Council as a possible source of authority for the Local Rule. The power to make orders regarding the "expedition of the business of the courts in each circuit", *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 108 (1970) (Harlan, J., concurring), cannot authorize a Judicial Council to judicially legislate a subsidiary court system to hear over 500,000 pending bankruptcy cases, each of which may involve numerous different civil proceedings. Similarly, the cases cited by Braniff involving Fed. R. Civ. P. 83 provide no authority for the sweeping automatic reference under the Local Rule.[10]

[8]No such complete diversity exists in the proceedings below; both Petitioner and Braniff have their principal place of business in Texas. *See* 28 U.S.C. § 1332(c).

[9]Section 332(d)(1) authorizes the Judicial Councils of each circuit to "make all necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit." 28 U.S.C. § 332(d)(1).

[10]In *Franquez v. United States*, 604 F.2d 1239 (9th Cir. 1979), the court held only that the granting of a trial by jury, a right which the district court had found that Congress intended to provide under the legislation governing the action, was not inconsistent with the authority granted the district court under a statute authorizing the use of special masters or judges in certain actions. *Kimbrough v. Holiday Inn*, 478 F.Supp. 566 (E.D. Pa. 1979) held only that a local rule which provided for compulsory, *non-binding* pre-trial arbitration was not a basic procedural innovation because the right to a jury trial was not violated.

Braniff contends that Fed. R. Civ. P. 53 does not govern references under the Local Rule, because of the existence of the Federal Magistrates Act, 28 U.S.C. §§ 631, *et seq.*, purportedly demonstrates that Rule 53 does not apply to all references. Obviously, the statutory authority granted under the Federal Magistrates Act to delegate certain limited adjudicatory functions to United States magistrates exists outside of and in addition to the authority granted under Rule 53. However, absent statutory authorization, courts may not refer judicial functions to referees without regard to the constraints of Rule 53.[11]

Similarly, Braniff argues that the inherent power of a district court recognized by this Court in *In re Peterson*, 253 U.S. 300 (1920) is unlimited in scope. The inherent power recognized in *Peterson* is a limited authority to delegate certain quasi-judicial pre-trial tasks of an advisory nature to an agent of the court, where such a delegation is not inconsistent with legislation. It does not give authority to a district court to delegate to an agent the authority to enter a final order or judgment effective upon entry unless stayed pending appeal to the district court.[12]

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[11]Braniff asserts that *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28 (8th Cir. 1966) stands only for the proposition that where a master is appointed under Rule 53, it must adhere to the requirements of Rule 53. Braniff's construction of Rule 53 would permit district courts to ignore the "exceptional circumstances" requirement of Rule 53 since under Braniff's reasoning a court need only state that a particular reference is not under Rule 53 in order not to be subject to the constraints of Rule 53.

[12]In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), cited by Braniff, the district court appointed a person to assist it in administering a post-decretal remedy. *Ruiz* recognized only the power "of a federal court to appoint an agent to supervise the implementation of its decrees." 679 F.2d at 1161. Similarly, *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), also relied upon by Braniff, merely sanctioned the appointment of a "master" to conduct a proceeding upon a *subpoena duces tecum* to determine whether an attorney-client privilege attached to certain documents. The court there noted that the reference was an incident to the proceeding which was authorized only so long as no rights were prejudiced thereby and that, where the master's actions accomplished a judicial result, it had no legal validity absent subsequent confirmation by the district court. 232 F.2d at 865.

V.
CONCLUSION.

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and should reverse the orders affirming the validity and constitutionality of the Local Rule.

Respectfully submitted,

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No. 82-1623

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN AIRLINES, INC., PETITIONER

v.

BRANIFF AIRWAYS, INCORPORATED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district courts continue to have jurisdiction over matters and proceedings in bankruptcy following this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982).

2. Whether the local emergency rule adopted by the district court at the direction of the Judicial Council of the Fifth Circuit for the limited referral of bankruptcy matters to bankruptcy judges is a valid exercise of the district court's authority.

3. Whether the local emergency rule is constitutional in light of this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTEREST OF THE UNITED STATES

The United States has a strong interest in the resolution of this case on behalf of the public interest in a viable bankruptcy system. The Administrative Office of the United States Courts, *1982 Annual Report of the Director* 8, 10 (preliminary ed. 1982) showed that at the close of the year there were more than 700,000 bankruptcy estates—100,000 adversary proceedings—currently pending, and that new bankruptcy estates were being commenced at the rate of more

than 10,000 per week. As these figures suggest, any lapse of bankruptcy jurisdiction on a nationwide basis would result in severe economic dislocation. Moreover, a lapse of jurisdiction would idle the entire existing bankruptcy system for which Congress has appropriated substantial funds and would result in a denial of substantive rights that Congress has provided through bankruptcy legislation. Thus, the United States has a strong interest in supporting the maintenance of a functioning bankruptcy system and in defending its validity.

STATEMENT

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982) (*Marathon*), this Court partially invalidated the jurisdictional provisions of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, holding that Article III prohibited vesting the bankruptcy courts with jurisdiction to decide the state law claim involved there. The Court stayed its decision until December 24, 1982.

In light of the broad public interest in a viable bankruptcy system, and in anticipation of Congress' inability to enact remedial legislation before this Court's stay of its *Marathon* decision expired, the Judicial Conference of the United States instructed the Director of the Administrative Office of the United States Courts to provide the Judicial Council of each circuit with a proposed rule addressed to the question of bankruptcy jurisdiction that would take effect if Congress failed to act in time. The proposed rule was submitted by the Judicial Council for the Fifth Circuit for adoption by the district courts of the circuit,

and was duly adopted as a Local Rule by the United States District Court for the Northern District of Texas (see Pet. App. 28-33), effective December 25, 1982. At the direction of the Judicial Councils of the other circuits, the rule has now been adopted in the same or similar form by all the district courts of the United States. The rule provides, *inter alia*, for the reference of bankruptcy cases to the bankruptcy courts, subject to withdrawal by the district court, and limits the powers that can be exercised by the bankruptcy judges (see Pet. App. 29-31). It is an interim measure designed to permit the bankruptcy system to continue without disruption under jurisdictional grants remaining in the law as limited by *Marathon*, pending congressional action. The rule will expire when Congress enacts appropriate remedial legislation or on March 31, 1984, "whichever first occurs" (Pet. App. 29).

This controversy arises out of the reorganization in bankruptcy of Braniff Airways, Inc., in the United States District Court for the Northern District of Texas. Petitioner moved to revoke the district court's reference to the bankruptcy judge pursuant to the local rule, arguing both that the district court itself lacked bankruptcy jurisdiction after *Marathon* and that, in any event, the rule was unconstitutional (Pet. App. 5). The district court denied the motion. It ruled that bankruptcy jurisdiction remains in the district courts pursuant to 28 U.S.C. (Supp. V) 1471(a) and (b), enacted by Section 241(a) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2668, because those subsections were not invalidated by *Marathon* (Pet. App. 6-7), or, alternatively, pursuant to 28 U.S.C. 1334, 1331, and 1332

(Pet. App. 8-10).[1] In addition, the court noted that, under the transition provisions of the Bankruptcy Reform Act,[2] the structure of the old Bankruptcy Act continues to exist through March 31, 1984, and that this structure is available to be utilized for the adjudication of bankruptcy cases and proceedings (*id.* at 10-11).

Turning to the specifics of the challenged local rule, the district court concluded that the rule was a "necessary" and "appropriate" measure to enable the courts to implement the substantive provisions of the Bankruptcy Code. The court concluded that the rule was duly promulgated pursuant to statutory authority afforded by 11 U.S.C. (Supp. V) 105(a),[3]

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[1] 28 U.S.C. 1334 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.

The section was amended by Section 238(a) of the Bankruptcy Reform Act of 1978 (92 Stat. 2667), to provide for appellate bankruptcy jurisdiction by the district courts; however, that amendment is not scheduled to take effect until April 1, 1984. See Section 402(b) of the Bankruptcy Reform Act of 1978, 92 Stat. 2682.

[2] These transition provisions are found in Title IV of the Bankruptcy Reform Act of 1978 (92 Stat. 2682-2688). Under Section 404(a), the district courts continue to be "courts of bankruptcy" for purposes of the Act until April 1, 1984, and under Section 404(b) the terms of sitting bankruptcy referees (or "judges") are extended until that date. 92 Stat. 2683. Under Section 405(a), 92 Stat. 2685, all cases commenced under Title 11 and certain related cases are referred to bankruptcy judges, who are to exercise the jurisdiction conferred by Section 241(a), 92 Stat. 2668 (now codified at 28 U.S.C. (Supp. V) 1471).

[3] Section 105(a), as amended by Section 101 of the Bankruptcy Reform Act of 1978, provides that the "bankruptcy

Bankr. R. 927,[4] and 28 U.S.C. 2071, which empowers all courts established by Act of Congress to "prescribe rules for the conduct of their business" (Pet. App. 11-12). The court also found that the rule's adoption was well within the inherent equitable powers with which the courts are clothed (*id.* at 12-14). The court emphasized that under the local rule the bankruptcy judge would not decide "any matter which could not constitutionally be decided by an non-Art. III judge" in light of *Marathon*, but that the district court itself would make the final determination in such matters (Pet. App. 15).

The court of appeals affirmed the judgment of the district court "essentially for the reasons stated in its memorandum opinion" (Pet. App. 1), adding (footnote omitted):

> [I]n particular * * * we conclude that 28 United States Code § 1471(a) and (b) were not invalidated by the *Marathon* decision, but if they were, nevertheless, the jurisdictional grant of United States Code 1334 remains effective during the transitional period.

ARGUMENT

Petitioner contends (Pet. 9-29) that the jurisdiction invoked by the bankruptcy court in this case is invalid for several reasons. This contention does not warrant review by this Court.

1. At the outset, we note that there is no merit to petitioner's contention that the Court should grant

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court may issue any order * * * necessary or appropriate to carry out the provisions of [Title 11]."

[4] Bankruptcy Rule 927 authorizes the district courts to adopt local rules establishing bankruptcy procedures that are not inconsistent with the general bankruptcy rules.

review here in order to alleviate "confusion" (Pet. 3) or "uncertainty" (Pet. 10) in the lower courts. The two other courts of appeals to consider the question have reached decisions in accord with the decision below. *White Motors Corp.* v. *Citibank, N.A.*, No. 82-3638 (6th Cir. Apr. 1, 1983); *In re Hansen*, 702 F.2d 728 (8th Cir. 1983).[5] Moreover, the only district court decision to which petitioner can point as holding that the interim emergency rule is invalid (*In re Matlock Trailer Corp.*, 27 Bankr. 318 (M.D. Tenn. 1983)), as well as two of the unreversed bankruptcy court decisions cited (see Pet. 9 n.9), have been implicitly reversed by the Sixth Circuit in *White Motors Corp.* v. *Citibank, N.A.*, *supra*, slip op. 11, 15-21. There are numerous district court decisions holding the rule valid.[6]

The validity of the local rule, and hence the continuation of a viable bankruptcy system, thus appears to be well settled in the lower courts. Both Congress, in appropriating substantial funds for the system,[7] and this Court, in issuing new Bankruptcy Rules on April 25, 1983, effective August 1, 1983, have further

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[5] The issue is also pending in the Second Circuit in *In re Keene Corporation and GAF Corporation*, No. 83-3013.

[6] See, *e.g.*, *In re Kaiser*, No. 83 Civ. 1384 (S.D. N.Y. Apr. 11, 1983); *In re QI Corp.*, 28 Bankr. 647 (E.D. N.Y. 1983); *Moody* v. *Martin*, 27 Bankr. 991 (W.D. Wis. 1983); *Otero Mills, Inc.* v. *Security Bank & Trust*, 28 Bankr. Rep. 386 (D. N.M. 1983); *In re Color Craft Press Ltd.*, 27 Bankr. Rep. 962 (D. Utah 1983) (en banc); *In re Northland Point Partners*, 26 Bankr. 860 (E.D. Mich. 1983).

[7] See, *e.g.*, The Judicial Appropriation Act, 1983, Title IV, H.R. 6957, 97th Cong., 2d Sess. 42 (1983), as enacted by the Continuing Resolution Act, Pub. L. No. 97-276, Section 101(a), 96 Stat. 1186.

contributed to the efficient functioning of the bankruptcy system under the local rule. Granting certiorari here would have the unfortunate effect of reintroducing, pending this Court's decision, the confusion over the validity of the present bankruptcy system that the decisions of the Fifth, Sixth and Eighth Circuits have substantially alleviated.

2. Moreover, petitioner's challenges to the decision below are without merit. Petitioner first contends (Pet. 18-23) that even the district courts lack bankruptcy jurisdiction in light of *Marathon*. This contention is wrong on two counts; the district courts have bankruptcy jurisdiction under 28 U.S.C. (Supp. V) 1471(a) and (b) and under 28 U.S.C. 1334.

a. Petitioner erroneously asserts (Pet. 12-14) that this Court in *Marathon* struck down as unconstitutional the grant of bankruptcy jurisdiction to the district courts contained in 28 U.S.C. (Supp. V) 1471(a) and (b). But the question of the *district courts'* jurisdiction under the 1978 Bankruptcy Reform Act was not even in issue in *Marathon*.[8] The plurality concluded only that "the broad grant of

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[8] The district court's order in *Marathon*, which was appealed directly to this Court, had dismissed the adversary proceeding instituted by Northern Pipeline against Marathon arising from a state law contract claim on the ground that "the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges * * * is an unconstitutional delegation of Article III judicial power to a nontenured Article I court." 12 Bankr. 928, 956 (D. Minn. 1981). The question presented to this Court, according to the plurality opinion, was "whether the assignment by Congress to *bankruptcy judges* of the jurisdiction granted in § 241(a) of the Bankruptcy Act of 1978 * * * violates Article III of the Constitution." *Marathon, supra*, slip op. 1 (emphasis added).

jurisdiction to the bankruptcy courts contained in § 241(a)[9] is unconstitutional." Slip op. 37. The plurality opinion stated (*id.* at 36-37):

> We conclude that § 241(a) * * * has impermissibly removed most, if not all, of "the essential attributes of judicial power" from the Art. III district court and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

By finding that the power was "impermissibly removed" from the Article III district court, the plurality opinion certainly suggests that it was properly vested in the district courts by 28 U.S.C. (Supp. V) 1471(a) and (b) in the first place. In any event, "the broad grant of jurisdiction to the bankruptcy courts," which the Court concluded was invalid, is found entirely in subsection (c), which transfers to the bankruptcy court "all of the jurisdiction conferred * * * on the district courts."

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[9] The jurisdictional grant of Section 241(a), as codified in 28 U.S.C. (Supp. V) 1471, provides:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

The footnote that follows in the plurality opinion, dealing with the question of severability, indicates even more clearly that the Court's invalidation of the statute is limited to the jurisdictional grant to the new bankruptcy courts contained in 28 U.S.C. (Supp. V) 1471(c). The plurality remarked (*Marathon, supra*, slip op. 37 n.40; emphasis added):

> It is clear that, at the least, the new *bankruptcy judges* cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested judisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass *this and similar claims*, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to *other types of claims*, and thus subject to Art. III constitutional challenge on a *claim-by claim basis*. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. * * * Nor can we assume, as THE CHIEF JUSTICE suggests, post, at 2, that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct."

This footnote explains that the plurality's discussion of severability did not concern the question whether jurisdiction over bankruptcy matters contin-

ues in the *district courts*, as petitioner asserts (Pet. 12-13); rather, it focused on the question whether jurisdiction over core bankruptcy proceedings, which were not involved in *Marathon*, continues in the *bankruptcy courts*, in circumstances where, because of Article III limitations, the bankruptcy courts could not continue to exercise jurisdiction over certain related proceedings, such as the state-law contract claim involved in *Marathon*. Thus, in footnote 40 the plurality declined to withdraw "the jurisdiction of the *bankruptcy court* over these matters [*i.e.*, certain related proceedings that require Article III courts]," while leaving the *bankruptcy court's* jurisdiction "intact with respect to other types of claims [*i.e.*, core bankruptcy proceedings or related proceedings that do not require Article III courts]." The plurality refused to sever these two facets of the "*single* statutory grant of jurisdiction" (*ibid.*; emphasis added), namely, the grant of jurisdiction to the *bankruptcy court* in 28 U.S.C. (Supp. V) 1471 (c), principally because "one of the express purposes of the Act was to ensure adjudication of all claims in a single forum * * *." Accordingly, the court invalidated all of the derivative jurisdiction given to the *bankruptcy court* in Section 1471(c) and affirmed the district court's judgment dismissing the action. Justice Rehnquist's concurring opinion further evidences that the Court invalidated only subsection (c) (*Marathon, supra*, slip op. 4; emphasis added):

> I would * * * hold so much of the Bankruptcy Act of 1978 as enables a *Bankruptcy Court* to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that *this grant of au-*

> *thority* is not readily severable from the *remaining grant of authority to the Bankruptcy Courts* under § 241(a), * * * I concur in the judgment.

In short, the Court in *Marathon* did not address the severability of the initial grant of jurisdiction to the district courts in 28 U.S.C. (Supp. V) 1471 (a) and (b) from the delegation of that jurisdiction to the bankruptcy courts in subsection (c). Nothing in *Marathon* suggests that the Court struck down the bankruptcy jurisdiction of the district courts on the ground that it was not severable from the jurisdictional grant to the bankruptcy courts that suffered from Article III problems.

b. Assuming *arguendo* that this Court did invalidate the entire jurisdictional grant of Section 241(a) of the Bankruptcy Reform Act of 1978 codified in 28 U.S.C. (Supp. V) 1471, the district courts nonetheless have original jurisdiction of "all matters and proceedings in bankruptcy" under 28 U.S.C. 1334. While Section 238(a) of the 1978 Act amends Section 1334 by eliminating the old language and granting the district courts "jurisdiction of appeals from all final judgments, orders and decrees of bankruptcy courts," the amendment does not take effect until April 1, 1984, the date on which the new bankruptcy courts created by the Bankruptcy Reform Act of 1978 were to be finally established. See Section 402(b), 92 Stat. 2682. In the interval between October 1, 1979 (the effective date of most substantive provisions of the 1978 Act) and April 1, 1984, the "courts of bankruptcy" created by the former Bankruptcy Act—*i.e.*, the district courts—were to be the "courts of bankruptcy for the purposes" of the 1978 Act. See Section 404(a), 92 Stat. 2683. Thus, Congress retained Section 1334 to serve as a jurisdictional underpinning for the district courts' continued exercise of bankruptcy

jurisdiction until the new jurisdictional provisions would take effect and the newly created bankruptcy courts would come into existence. See *White Motor Corp.* v. *Citibank, N.A.*, *supra*, slip op. 14.[10] Accordingly, the district courts retain original jurisdiction over bankruptcy proceedings under 28 U.S.C. 1334 until April 1, 1984, regardless of whether 28 U.S.C. (Supp. V) 1471(a) and (b) remain valid in the wake of *Marathon*.

3. Petitioner's contention (Pet. 23-28) that the district court lacked the power to promulgate the local rule is insubstantial. The rule is an appropriate exercise of the district courts' inherent authority to "prescribe rules for the conduct of their business." 28 U.S.C. 2071. As explained in the "emergency resolution" that prefaces the rule's substantive provisions (Pet. App. 28-29), "exceptional circumstances" existed in the wake of *Marathon* that required the promulgation of the rule to enable the district courts to carry out their bankruptcy duties until Congress enacts appropriate remedial legislation.[11]

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[10] Moreover, as the court of appeals explained in *White Motor*, even assuming that the 1978 Act operated as an implied repeal of Section 1334 during the transition period, principles of statutory construction suggest that the repealed section is " 'revived' to avoid a chaotic hiatus in the law" (slip op. 15) if the replacement jurisdictional grant is declared unconstitutional. See 1A C. Sands, *Sutherland Statutory Construction* § 23.24 (4th ed. 1973).

[11] These exceptional circumstances include:

> (1) The unanticipated unconstitutionality of the grant of power to bankruptcy judges in Section 241(a) of [the Bankruptcy Reform Act];
>
> (2) The clear intent of Congress to refer bankruptcy matters to bankruptcy judges;

Specific authority for the limited delegation by the district courts of their bankruptcy powers to bankruptcy judges is found in Bankruptcy Rule 927, which gives the district courts the power to adopt "rules governing practice and procedure under the Act." In addition, Section 105(a) of the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. V) 105(a), gives bankruptcy courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This grant of authority must be read in light of Section 404(a) of the Bankruptcy Reform Act of 1978 (82 Stat. 2683), which denominates the district courts as "courts of bankruptcy" during the transition period. See also *White Motor Corp.* v. *Citibank, N.A.*, *supra*, slip op. 17 n.4. More generally, there has long been recognized an inherent power of Article III courts "to provide themselves with appropriate instruments required for the performance of their duties" (*Ex parte Peterson*, 253 U.S. 300, 312 (1920)), a power now codified in 28 U.S.C. 2071. Thus, as explained in greater detail by the Sixth Circuit in *White Motor Corp.* v. *Citibank, N.A.*, *supra*, slip op. 16-18, the district courts had statutory authority to adopt the interim emergency rule, and the Judicial Councils possessed the power to direct the adoption of the rule.[12]

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(3) The specialized expertise necessary to the determination of bankruptcy matters; and

(4) The administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

[12] There is no merit to petitioner's contention (Pet. 24-26) that the interim emergency rule is invalid on the ground that it conflicts with Rules 53 and 83 of the Federal Rules of Civil

4. Petitioner also contends (Pet. 14-18) that the local rule is unconstitutional in light of *Marathon*. This contention is erroneous for reasons well stated by the Sixth Circuit in *White Motor Corp.* v. *Citibank*, *supra*, slip op. 18-21. The interim emergency rule carefully avoids the constitutional pitfalls of the statutory grant of jurisdiction to the bankruptcy courts struck down in *Marathon*. Specifically, the rule provides procedures that sufficiently restrict the power of bankruptcy judges so that " 'the essential atributes' of judicial power are retained in [an] Art. III court." *Marathon*, *supra*, slip op. 30 (plurality opinion), quoting *Crowell* v. *Benson*, 285 U.S. 22, 54 (1932).

Under the rule, none of the district courts' bankruptcy power is redelegated exclusively or finally to

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Procedure. While bankruptcy judges (or "referees") are sometimes analogized to masters, whose appointments are governed generally by Rule 53, the analogy is imprecise. Unlike the appointment of a master, the delegation to bankruptcy judges makes use of an entire system of bankruptcy courts already staffed with experienced judges who have specialized knowledge and experience in the handling of bankruptcy cases. Moreover, the system was created by Congress, not by the courts. Prior to 1978, cases were referred to bankruptcy judges in a manner similar to that provided under the local rule, and this system was never thought to violate the Rules of Civil Procedure. Bankruptcy judges, therefore, do not stand on the same footing as masters who serve pursuant to Rule 53, and the restrictions imposed upon the use of masters in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), are not applicable here.

Similarly, Rule 83, Fed. R. Civ. P. is not directly applicable here in light of the specific applicability of Bankruptcy Rule 927. In any event, the local rule is quite different from the rule invalidated in *Miner* v. *Atlass*, 363 U.S. 641 (1960) (see Pet. 24), and it is properly characterized as a procedural rule that is within the power of the district courts to promulgate.

bankruptcy judges. See *Marathon*, *supra*, slip op. 30-32. While the rule provides for the automatic reference to bankruptcy judges of all cases arising under Title 11 and all civil proceedings arising in or related to cases under Title 11, subsection (c) provides that the reference of any case may be withdrawn at any time upon motion of the court or any party (Pet. App. 29-30). If, after withdrawing a reference, the district court refers a matter back to a bankruptcy judge in whole or in part, it may do so "with instructions specifying the powers and functions that the bankruptcy judges may exercise" (*ibid.*). Thus, the rule provides the necessary procedural mechanism to ensure that any proceeding that a district court determines must be heard by an Article III court will in fact be heard by the district court.

Moreover, unlike the statutory provisions considered in *Marathon*, the rule (subsection (e)(2)(B)) provides that on appeals from bankruptcy judgments, the district court "may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge" (Pet. App. 32). This provision for *de novo* review and hearing and the additional requirement that the district court "[a]t the conclusion of the review * * * enter an appropriate order or judgment" (*ibid.*) confirm the adjunct status of the bankruptcy judges and further support the constitutionality of their authority under the emergency rule. See *United States* v. *Raddatz*, 447 U.S. 667 (1980).

Finally, the emergency rule respects the constitutional concerns explicated in the plurality opinion in

Marathon by placing greater restrictions on bankruptcy judges when they handle related proceedings (defined in subsection (d)(3)(A); Pet. App. 31), which may or may not involve federal rights and laws, than when they handle core bankruptcy proceedings.[13] For related proceedings, the emergency rule (subsection (d)(3)(B)) specifically forbids bankruptcy judges from entering binding judgments and limits their power to "submit[ting] findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge" (Pet. App. 31).[14] In addition, the emergency rule provides (subsection (e)(2)(A)(iii)) that a district judge "shall review" any proposed order or judgment in a related proceeding "whether or not any notice of appeal or application for leave to appeal has been filed" (Pet. App. 32). These provisions confirm that, for related proceedings, the attributes of judicial power are retained in Article III district courts.

Thus, in the words of the Sixth Circuit (*White Motor Corp.* v. *Citibank, N.A.*, *supra*, slip op. 18):

> The interim rule does not violate the Constitution because the district courts retain primary jurisdiction over all bankruptcy proceedings.

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[13] It cannot seriously be contended that the emergency rule is invalid under the *holding* of *Marathon*, which is limited by the narrow scope of Justice Rehnquist's concurring opinion.

[14] Consensual reference of a civil matter to a non-Article III judicial officer for trial and entry of judgment does not violate Article III. See, *e.g.*, *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123 (1864); *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F.2d 499, 503-507 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

> The bankruptcy courts have only derivative jurisdiction. They do not operate under an exclusive grant of jurisdiction as in § 1471(c) but rather derive their jurisdiction from the district courts as under the Chandler Act. The district courts retain control and primary responsibility for the conduct of bankruptcy proceedings. The interim rule implants sufficient mechanisms in the existing system to ensure that bankruptcy cases are resolved through a constitutionally valid process.

In sum, the district courts possess bankruptcy jurisdiction in the aftermath of *Marathon*, and by means of the interim emergency rule they are lawfully exercising that jurisdiction in a manner that adheres to Congress' intent as closely as constitutional limitations permit.[15] There is no reason for this Court to disturb the functioning of this interim system of bankruptcy administration pending congressional action to provide a permanent solution to the dilemma created by the constitutional deficiencies in the Bankruptcy Reform Act of 1978.

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[15] There is no merit to petitioner's contention (Pet. 17) that the interim emergency rule is invalid because it contravenes the congressional intent in enacting the 1978 Act "to eliminate the summary/plenary jurisdiction distinction by centralizing all bankruptcy jurisdiction in a single forum." Although it is true that Congress wished "to ensure adjudication of all claims in a single forum" (*Marathon*, *supra*, slip op. 37 n.40), it defies common sense to suggest that Congress, which has provided for continuous bankruptcy jurisdiction in the federal courts since the Bankruptcy Act of 1898, would prefer *no* bankruptcy jurisdiction in the aftermath of *Marathon* to the two-tiered bankruptcy jurisdiction that existed under prior law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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